(15)

No. 92-34-CFX
Status: GRANTED

Title: Musick, Peeler & Garrett, et al., Petitioners
v.
Employers Insurance of Wausau, et al.

Docketed:
July 2, 1992

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Bird,Charles A.

Counsel for respondent: Nagler,Lawrence H., Pincus,Andrew J., Olson,Theodore B.

Entry	Date	Note	Proceedings and Orders
1	Jul 2 1992	G	Petition for writ of certiorari filed.
2	Jul 31 1992	G	Motion of National Association of Securities and Commercial Law Attorneys for leave to file a brief as amicus curiae filed.
3	Aug 6 1992		Brief of respondents Employers Insurance of Wausau, et al. in opposition filed.
4	Aug 12 1992		DISTRIBUTED. September 28, 1992
5	Sep 1 1992	X	Reply brief of petitioners Musick, Peeler, & Garrett, et al. filed.
6	Oct 5 1992		Motion of National Association of Securities and Commercial Law Attorneys for leave to file a brief as amicus curiae GRANTED.
7	Oct 5 1992		Petition GRANTED.
			**********
8	Nov 19 1992		Brief of petitioners filed.
9	Nov 19 1992		Joint appendix filed.
10	Nov 19 1992		Brief amicus curiae of Natl. Association of Securities and Commercial Law Attorneys filed.
11	Dec 4 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
12	Dec 14 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
14	Dec 14 1992		Order extending time to file brief of respondent on the merits until December 31, 1992.
15	Dec 28 1992		SET FOR ARGUMENT MONDAY, MARCH 1, 1993. (4TH CASE).
16	Dec 28 1992		Brief amicus curiae of United States filed.
19	Dec 30 1992		Brief of respondents Peat Marwick Main & Co., et al. filed.
17	Dec 31 1992		Brief amici curiae of First Boston Corporation, et al. filed.
18	Dec 31 1992		Brief amicus curiae of American Institute of Certified Public Accountants filed.
20	Dec 31 1992		Brief of respondents Employers Insurance of Wausau, et al. filed.
21	Dec 31 1992		Brief amicus curiae of Securities Industry Association filed.
22	Jan 5 1993		CIRCULATED.
23	Feb 2 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.

No. 92-34-CFX

Entry	Date	Note	Proceedings and Orders
24	Feb 3 1993		Record filed.
		*	Original proceedings United States District Court for the Southern District of California (1 Box)
25	Mar 1 1993		ARGUED.

92-34

No. _____

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In The

Supreme Court of the United States

October Term, 1991

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR,

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal courts may imply a private right to contribution in Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below are those named in the caption, K.M.G. Main Hurdman and Peat Marwick, Main & Co.

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No. _____

In The

Supreme Court of the United States

October Term, 1991

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR,

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Musick, Peeler & Garrett, Leonard Castro, Robert Schuchard, J.H. Cohn & Co., Ed Bacani and Robert Torkar respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, dated January 23, 1992, which appears in the Appendix at App. 1.

The decision reversed the district court's dismissal of this litigation on the ground that the plaintiff insurance companies may assert a private right of contribution under section 10(b) of the Securities Exchange Act of

1934. The insurance companies made their claims as alleged subrogees of defendants who settled a securities class action before the insurance companies filed this action. The Ninth Circuit based its decision on its rule that section 10(b) and rule 10b-5 of the Securities Exchange Commission "imply a right of contribution." *Smith v. Mulvaney*, 827 F.2d 558, 561 (9th Cir. 1987). App. 4. The Ninth Circuit's rule conflicts directly with the Eighth Circuit's holding that federal courts lack the power to imply such a right of contribution in the same provisions. *Chutich v. Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992), *reh'g en banc denied*, 1992 U.S.App. Lexis 10390 (8th Cir. 1992).

OPINIONS BELOW

The Opinion of the Ninth Circuit appears in the Appendix at App. 1. The opinion is reported at 954 F.2d 575.

The decision of the District Court appears in the Appendix at App. 14. The decision is reported at Fed.Sec.L.Rep.(CCH) ¶ 95208.

The Judgment of the District Court appears in the Appendix at App. 31. The Judgment is unreported.

The order of the Ninth Circuit denying rehearing and rejecting the suggestion of rehearing *en banc* appears in the appendix at App. 32. The order is unreported.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals was entered on January 23, 1992. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on May 28, 1992.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –
>
> (a) . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

STATEMENT OF THE CASE

The *Cousins* Case.

Certain individuals in 1984 filed a securities class action denominated *In re Cousins Securities Litigation*, No. 84-1821-B(IEG) in the United States District Court for the Southern District of California. Defendants in the case consisted primarily of Cousins Home Furnishings, Inc. and its directors and officers. After extensive discovery, the *Cousins* case was settled for $13,500,000, of which Employers Insurance of Wausau and Federal Insurance Company paid all but $500,000. In the course of obtaining court approval of the settlement, the insured defendants made extensive representations that they were paying their "fair share" of the total damages sustained by the class. Judgment was entered dismissing the *Cousins* case pursuant to the settlement on August 23, 1988.

Parties to Respondents' Lawsuit.

Respondents, Employers Insurance of Wausau and Federal Insurance Company, provided insurance to certain of the defendants in the *Cousins* case. Petitioners are attorneys, accountants and their firms. Petitioners provided professional services to the *Cousins* defendants during the time defined as the class period in the *Cousins* case.

Respondents' Lawsuit.

Respondents sued Petitioners for damages approximately eight months after the *Cousins* case concluded. Respondents allege they are subrogated to the rights of

the defendants in the *Cousins* case whose settlement Respondents funded. Respondents assert claims for contribution under state and federal law, including section 10(b) of the Securities Exchange Act of 1934 ("the Exchange Act") and Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b-5 ("Rule 10b-5"). The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

The District Court granted Petitioners' motion to dismiss Respondents' lawsuit. Judgment of dismissal was entered April 12, 1990. Respondents appealed.

The Ninth Circuit Decision.

The Court of Appeals reversed the District Court in a published opinion. The Court of Appeals acknowledged neither section 10(b) of the Exchange Act nor Rule 10b-5 provides an explicit right of contribution. The Court of Appeals reaffirmed its rule implying a private right of contribution in section 10(b) and Rule 10b-5.[1] *Smith v. Mulvaney*, 827 F.2d 558, 561 (9th Cir. 1987). The Ninth Circuit went on to rule that settling defendants' representations that they paid their "fair share" of damages did not waive or bar their claims for contribution.

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[1] The Ninth Circuit firmly enforces a rule forbidding any three judge panel from overruling a previous Ninth Circuit panel decision. *United Scottish Ins. Co. v. United States*, 614 F.2d 188, 191 (9th Cir. 1980); *Pratt v. McCarthy*, 850 F.2d 590, 593 (9th Cir. 1988); *Hard v. Burlington Northern Railroad Co.*, 870 F.2d 1454 (9th Cir. 1989); *Owen v. Commissioner of Internal Revenue*, 881 F.2d 832, 834 (9th Cir. 1989), *cert. denied* 493 U.S. 1070 (1990).

Petition for Rehearing

Petitioners sought rehearing and suggested rehearing *en banc*. While the petition and suggestion were pending, the Eighth Circuit published its decision in *Chutich v. Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992) holding federal courts lack the power to imply a private right of contribution in section 10(b) of the Exchange Act and Rule 10b-5. Petitioners called the Ninth Circuit's *en banc* attention to the Eighth Circuit's decision and asked the Ninth Circuit to overrule *Smith v. Mulvaney*, resolving the circuit conflict. The Ninth Circuit denied the petition and rejected the suggestion of rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S DECISION PERPETUATES AN EXPLICIT CONFLICT BETWEEN THE CIRCUIT COURTS

The Ninth Circuit has been a leading court endorsing creation of an implied right of contribution under section 10(b) and Rule 10b-5. *See Smith v. Mulvaney*, 827 F.2d 558, 560 (9th Cir. 1987). This case reaffirms the Ninth Circuit's dubious leadership. Although the Ninth Circuit is not alone, support for its position is eroding.

The initial circuit level decision implying a right of contribution was a *per curiam* opinion of the Second Circuit. *Globus, Inc. v. Law Research Service, Inc.*, 318 F.Supp. 955, 958, (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir. 1970); *cert. denied*, 404 U.S. 941 (1971). Later in the decade,

the Seventh Circuit joined the Second. *Heizer Corp. v. Ross*, 601 F.2d 330, 331-34 (7th Cir. 1979). For several years, the lower federal courts tended to treat the existence of an implied right of contribution as settled.

In 1981, this Court held the federal courts have the power to recognize a right of contribution in only two circumstances: (1) "through the affirmative creation of a right of action by Congress, either expressly or by clear implication;" or (2) "through the power of federal courts to fashion a federal common law of contribution." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981).

The Seventh Circuit disavowed *Heizer* after considering this Court's *Texas Industries* analysis of the limits of federal judicial power. *King v. Gibbs*, 876 F.2d 1275, 1280 (7th Cir. 1989). Although *King v. Gibbs* holds federal courts lack power to imply a right of indemnity, the Seventh Circuit's reasoning and disavowal of *Heizer* created the first conflict of a court of appeals' decision with *Globus v. Law Research* and *Smith v. Mulvaney*.

Recently the Eighth Circuit explicitly held federal courts lack power to create a right of action for contribution under section 10(b). *Chutich v. Touche Ross & Co.*, 960 F.2d 721, 723-24 (8th Cir. 1992). In *Chutich*, the Eighth Circuit followed *Texas Industries*, agreed with *King* and criticized both *Smith v. Mulvaney* and a Second Circuit decision that followed *Globus* without considering the effect of *Texas Industries*.[2]

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[2] The criticized Second Circuit decision is *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 588 (2d Cir. 1982), *cert. denied* 459 U.S. 838 (1982), *cert. denied*, 459 U.S. 908 (1982).

Other courts, applying *Texas Industries*, are recognizing they lack the power to imply a right of contribution in section 10(b). *In re Professional Financial Management, Ltd.*, 683 F.Supp. 1283, 1285-87 (D. Minn. 1988); *Robin v. Doctors Officenters Corp.*, 730 F.Supp. 122, 124-25 (N.D.Ill. 1989); *see also Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1102-04 (4th Cir. 1989) (holding no right to contribution may be implied in section 12(2) of the Securities Act of 1933) (*en banc*), *reh'g denied* 1989 U.S.App. Lexis 13457 (4th Cir. 1989).

The conflict between the circuits requires this Court's attention. Securities claims are transitory causes of action, and jurisdiction exists nationwide. The huge sums at stake in securities cases encourage forum shopping. The conflict assures that substantial rights will depend entirely upon a suit's venue.

II.

THE NINTH CIRCUIT IGNORES THIS COURT'S VIEWS OF FEDERAL JUDICIAL POWER WHEN IT IMPLIES A RIGHT OF CONTRIBUTION IN SECTION 10(b)

The Ninth Circuit wrongly decided both *Smith v. Mulvaney* and this case. The Ninth Circuit failed to apply *Texas Industries*. *Texas Industries* requires federal courts not to create a private right of contribution in section 10(b) and Rule 10b-5.

There is no "affirmative creation of a right of action" for contribution in section 10(b). The section lacks any

express civil remedy. The section also lacks a "clear implication" of a right of contribution. Nothing in the comprehensive 1933 and 1934 securities legislation or its history suggests Congress intended to protect defendants in securities litigation. To the contrary, section 10(b) itself speaks of protection of investors and the public. Where Congress did intend to protect particular defendants, it created an express right of contribution; of the seven express civil remedies, exactly three are accompanied by express contribution rights. Section 11(f) of the Securities Act of 1933, 15 U.S.C. § 77k(f); Section 9(e) of the Exchange Act, 15 U.S.C. § 78i(e); Section 18(b) of the Exchange Act, 15 U.S.C. § 78r(b). Congress did not affirmatively create a right of contribution in section 10(b).

Federal courts lack authority to create a federal common law of contribution among defendants in section 10(b) cases. A federal rule of decision is not needed to protect uniquely federal interests. *Texas Industries*, 451 U.S. at 640. Contribution among alleged securities law violators does not involve "the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, [or] admiralty." *Texas Industries*, 451 U.S. at 641. Therefore contribution does not affect uniquely federal interests, and federal courts need not create federal common law. Further, the Exchange Act lacks any general charter for federal courts to develop a federal common law of securities regulation. *See Texas Industries*, 451 U.S. at 642-43. Creating a claim for contribution expands federal judicial power far beyond defining the limits of a fraud victim's implied claim under

section 10(b) and invents a new cause of action for persons outside the scope of those intended to be benefitted by either section 10(b) or the fraud victim's implied right of action.

III.

THE NINTH CIRCUIT'S DECISION FORMS A PART OF A DERIVATIVE FEDERAL COMMON LAW JURISPRUDENCE WHICH ILLUSTRATES WHY COURTS SHOULD NOT HAVE CREATED AN IMPLIED RIGHT OF CONTRIBUTION

Circuits recognizing an implied right of contribution are infected with a secondary jurisprudence of "contribution bars" and the rights of settling and non-settling defendants. This secondary jurisprudence contains its own unresolved circuit-level conflicts and impairs courts' management of complex securities cases. The decisions attempting to solve the problems caused by creating the right of contribution illustrate why courts should not have created such a right.

The secondary jurisprudence exists because, as one District Judge eloquently stated:

> Anyone foolish enough to settle without barring contribution is courting disaster.

In re Nucorp Energy Securities Litigation, 661 F.Supp. 1403, 1408 (S.D. Cal. 1987).

Defendants in complex securities litigation simply will not settle unless they are assured the settlement terminates entirely their involvement with the litigation. Lower federal courts have therefore developed a federal

common law of "contribution bars" or "settlement bars." *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 599 (2d Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1228-29 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 232 (1990). This case is one of the Ninth Circuit's further elaborations of *Franklin*.

When they foreclose the contribution "rights" of some defendants, courts must consider how to protect those defendants from abusive or collusive settlements. A conflict exists between two inconsistent attempts to achieve fairness. In *Franklin*, the Ninth Circuit imposed the burden of determining fairness on the jury at trial. Under the *Franklin* rule, the jury must determine the relative fault of the settling defendants and the non-settling defendants; the non-settling defendants then are jointly liable for a percentage of the victims' total damage equal to their share of the relative fault. *Franklin*, 884 F.2d at 1231. In *Singer*, the Second Circuit required district courts to determine in a hearing at the time of the settlement whether the settlement is fair to the non-settling defendants; the amount of the settlement then is to be set off against from the plaintiffs' recovery from the non-settling defendants. *Singer*, 878 F.2d at 600.

Some courts have adopted the same view as *Franklin*. *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 772 F.Supp. 1565 (D.S.C. 1990); *In re Sunrise Securities Litigation*, 698 F.Supp 1256 (E.D. Pa. 1988).

Some courts have adopted the approach of *Singer*. *In re Atlantic Financial Management, Inc. Securities Litigation*,

718 F.Supp. 1012 (D.Mass. 1988); *In re Terra-Drill Partnerships Securities Litigation*, 726 F.Supp. 655 (S.D. Tex. 1989); *Dalton v. Alston & Bird*, 741 F.Supp. 157 (S.D. Ill. 1990); *MFS Municipal Income Trust v. American Medical International Inc.*, 751 F.Supp. 279 (D.Mass. 1990).

Neither approach to settlement bars is satisfactory. The *Franklin* approach has nearly terminated partial settlements of securities class actions in the Ninth Circuit. *Franklin* intensly motivates non-settling defendants to pursue the "empty chair" defense and ironically forces plaintiffs to defend the cases of the persons with whom the plaintiffs settled. *Franklin* makes it impossible for plaintiffs to settle with highly culpable but financially strapped defendants. Further, *Franklin* burdens juries with extra decisions in cases notorious for their complexity. *Singer* forces trial judges to determine the fairness of settlements, often when the facts are insufficiently developed to provide confidence in the fairness of the determination. *Singer* generates additional burdens for both trial and appellate courts; if a settlement is reversed on appeal, the case management consequences are severe.

The conflict between the circuits regarding bar orders causes confusion and case management problems in the district courts. Indeed, the conflict itself has undone at least one settlement because neither the parties nor the trial judge could determine how to protect the rights of the non-settling defendants. *In re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991).

The federal common law jurisprudence invented to control implied "rights" of contribution has become a malignant organism. It obstructs class action settlements

and complicates the duties of both judges and juries. The primary site of the malignancy is the authority creating the right of contribution. By excising the primary site, the Court will rid federal jurisprudence of the metastases as well.

CONCLUSION

For the foregoing reasons, including to resolve the explicit conflict between the Ninth Circuit's decision in this case and the decisions of the Eighth Circuit in *Chutich v. Touche Ross & Co.* and the Seventh Circuit in *King v. Gibbs*, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMPLOYERS INSURANCE OF WAUSAU; FEDERAL INSURANCE COMPANY,

Plaintiffs-Appellants,

v.

MUSICK, PEELER & GARRETT, A Partnership; LEONARD CASTRO, an Individual; ROBERT SCHUCHARD, an Individual; K.M.G. MAIN HURDMAN, A PARTNERSHIP; PEAT, MARWICK, MAIN & CO., a Partnership; J.H. COHN & CO., a Partnership; ED BACANI, an Individual; ROBERT TORKAR, an Individual; DOES 1 thru 100; and DOES 1 thru 300, Inclusive,

Defendants-Appellees.

No. 90-55791
D.C. No. CV-89-705-JLI
OPINION

Appeal from the United States District Court
for the Southern District of California
J. Lawrence Irving, District Judge, Presiding

Argued and Submitted
June 6, 1991 – Pasadena, California

Filed January 23, 1992

Before: Alfred T. Goodwin, Harry Pregerson and Arthur L. Alarcon, Circuit Judges.

Opinion by Judge Goodwin

COUNSEL

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William J. Reifman, Mayer, Brown & Platt, Los Angeles, California; Charles A. Bird, Luce, Forward, Hamilton & Scripps, San Diego, California, for the defendants-appellees.

OPINION

GOODWIN, Circuit Judge:

The securities fraud contribution question left open in *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied sub nom., Franklin v. Peat Marwick Main & Co.*, 111 S. Ct. 232 (1990) is presented in this appeal by insurance carriers who are subrogated to the contribution rights of settling defendants (their insureds).

The plaintiffs seek recovery against nonparties now alleged to be culpable in the original public offering that resulted in the underlying litigation. *Kaypro* held that the district court could properly bar the nonsettling defendants from seeking contribution from the settling defendants, and held further that the nonsettling defendant's exposure should be limited to their actual percentage of liability based upon their culpability as determined by trial. *Kaypro* left open the contribution liability of nonparties who would have been defendants had they been sued by the original plaintiffs, but who were, for various reasons, not named as parties and thus were not participants in the settlement negotiations.

Employers Insurance of Wausau (Wausau) and Federal Insurance Co. (Federal), insurers of the settling defendants in a securities fraud class action, *In re Cousins Securities Litigation*, No. 84-1821-(IEG), appeal the dismissal of their action for contribution under federal law and for comparative equitable indemnity under state law against the defendants, persons who were the attorneys and accountants of the insureds in the public offering that gave rise to the class action suit.

Shareholders of Cousins Home Furnishings, Inc. filed the class action against insureds – Cousins, along with its holding company, certain of its officers and directors, and its two lead underwriters – alleging violations of federal securities law and California corporations law in connection with a public offering in 1983. The shareholders did not, however, sue, nor did insureds implead the attorneys and accountants involved in the underlying transaction. All defendants in the suit entered into a settlement agreement with the plaintiff class agreeing to pay plaintiff shareholders $13.5 million, an amount determined by a federal magistrate after a "good faith" hearing to "represent[ ] the settling defendants' fair or proper share of the total damages sought by the plaintiffs."

The settlement contained a general release from liability, including the release of potential claims by the plaintiff class against insureds' attorneys and accountants, even though they were not defendants. At the time of the agreement, the statute of limitations had already run on claims by the plaintiff class against the non-party lawyers and accountants. Although agreeing to the settlement, insureds expressly denied liability. Wausau and

Federal (the "Insurers") have paid their appropriate percentages of the settlement amount.

The Insurers now assert the right, as insureds' subrogees, to sue the attorneys and accountants. Insurers' complaint, which resembles the shareholders' complaint against insureds in the class action, alleges various misrepresentations that defendants caused insureds to make to investors about matters germane to the public offering, in violation of section 10(b) of the Securities Exchange Act of 1933 and Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b-5.

Holding that a settling defendant who has paid no more than its fair share of the total liability is not entitled to contribution under federal securities law, the district court dismissed the action without leave to amend for failure to state a claim upon which relief may be granted, pursuant to Fed. R. Civ. P. 12(b)(6). This court reviews the granting of a 12(b)(6) motion *de novo*. *Massey v. Inland Boatmen's Union of Pacific*, 886 F.2d 1188, 1189 (9th Cir. 1989). Because we find that the Insurers have stated a valid claim for contribution, we reverse.

No explicit right to contribution is provided for in section 10(b) of the Securities Exchange Act of 1933 or Rule 10b-5. We have recognized, however, that these provisions imply a right of contribution. *See Kaypro*, 884 F.2d at 1226; *Smith v. Mulvaney*, 827 F.2d 558, 561 (9th Cir. 1987).

Actions for contribution arise in many different procedural settings. For example, contribution may be sought by one defendant against other named defendants by a motion to the court, *see Globus, Inc. v. Law Research*

Service, Inc., 318 F.Supp. 955, 957 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2nd Cir.), *cert. denied sub nom., Law Research Service, Inc. v. Blair & Co.*, 404 U.S. 941 (1971). An individual seeking contribution is not limited, however, to the parties named by the plaintiff in the original suit. Contribution may be the [sic] sought through a third party action pursuant to Rule 14(a) of the Federal Rules of Civil Procedure. *See Tucker v. Arthur Andersen & Co.*, 646F.2d 721, 727 n.7 (2nd Cir. 1981); *Odette v. Shearson Hammill & Co., Inc.*, 394 F.Supp. 946, 958 (S.D.N.Y. 1975); *Leggett & Myers, Inc. v. Bloomfield*, 380 F.Supp. 1044, 1047 (S.D.N.Y. 1974).

While actions for contribution are frequently brought in the context of third party practice, it does not follow that third party procedure is the exclusive remedy. The right of contribution is substantive in nature. "Rule 14, like all of the Federal Rules of Civil Procedure, is purely procedural. It does not create or modify any substantive rights, such as the right to indemnification or contribution." 3 Moore's Fed. Prac., ¶ 14.03[1]. Thus, a claim for contribution may be maintained in a separate action. *Heizer Corp. v. Ross*, 601 F.2d 330, 334 (7th Cir. 1979). *See also* Restatement (Second) of Torts § 886A(2) comment i (1979) ("A separate action for contribution is also available, particularly against a tortfeasor who was not a party to the original action.").

The provisions of the securities laws that explicitly provide for contribution envision the possibility of such claims being brought as separate causes of action. Contribution is not limited to parties involved in the original suit. Section 78r(b), for example, provides:

> Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, *if joined in the original suit*, would have been liable to make the same payment.

15 U.S.C. § 78r(b) (emphasis added). Actions for contribution may be brought, as in this case, in a separate proceeding.

The law of contribution is intricate, but the basic principle is easy to state:

> Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability. Recognition of the right reflects the view that when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability.

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 87-88 (1981) (footnotes omitted).

The defendants argue that an action for contribution exists only when an individual has paid more than her "fair share"of the common liability. Since the court in *Cousins* found that the settlement represented the insureds "fair and proper share of the total damages sought against them in the action," the defendants contend that the present action was properly dismissed.

The problem with this argument is that it fails to recognize that the meaning of the term "fair share"

depends upon the context in which it is used. The concept of fairness is inherently relational. There are three distinct relationships involved in the present case, each of which engenders a separate standard to assess the fairness of the *Cousins* settlement: (i) the relationship between individual *Cousins* defendants and the plaintiff class, (ii) the relationship between the *Cousins* defendants, "inter se," and (iii) the relationship between the *Cousins* defendants and joint tortfeasors who were not party to the suit.

Given that all tortfeasors are jointly and severally liable for the damages suffered by the plaintiff class, if only one of them were sued, it would be "fair" for that individual to be required to pay plaintiffs the full amount of the damages. The total sum of the damages would be that defendant's "fair share." When a number of joint tortfeasors are named as defendants, then the "fair share" of individual defendants is determined by their relative culpability. *Smith v. Mulvaney*, 827 F.2d at 561. "Relative" in this context is defined "interse," in reference to the other defendants involved to the suit. The failure to join all culpable actors has the obvious effect of inflating the relative culpability of the parties who are joined.

In approving the settlement agreement, the court in *Cousins* had to make two assessments. First, the court had to determine whether the total amount of the settlement bore a reasonable relationship to the damage suffered by the plaintiff class, discounting for factors such as the cost and uncertainty involved in litigating the dispute. Second, the court had to determine whether the amount paid

by each individual defendant was "fair" given their culpability *relative to the other defendants involved in the litigation*. It was in this context that the court determined that the settlement agreement represented the defendants' "fair and proper share of the total damages."

An action for contribution is concerned with the third type of fairness, that of the individual tortfeasor relative to all others jointly liable for the injury. If an individual pays more that [sic] her "fair share of the common liability," then an action for contribution will lie. *Northwest Airlines*, 451 U.S. at 88. It is axiomatic that a defendant may pay her fair share relative to other parties in the suit and yet pay more than her fair share relative to the universe of all joint tortfeaasors.[1] If a party can establish these facts, then she has stated a cause of action upon which relief may be granted and can successfully avoid a 12(b)(6) motion.

The defendants argue that the "good faith" approval of the settlement agreement by the court in *Cousins* should bar the present action. They misread the reach of

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[1] This is not to say that an action for contribution will always lie against non-party joint tortfeasors when named defendants negotiate a settlement agreement. The amount of damages in the settlement agreement is frequently discounted to reflect the cost and uncertainty associated with litigation. In determining whether or not an individual has paid more than her "fair share" for the purposes of contribution, the total amount of common liability is not discounted. If the discounting of the settlement amount is substantial, then a party to the settlement agreement may pay less than her "fair share" for purposes of contribution despite the fact that her relative culpability for purposes of the settlement agreement is inflated because all culpable parties were not joined.

the good faith hearing.[2] In the area of securities litigation, this issue is governed by federal common law. *See Kaypro*, 884 F.2d at 1228.

Kaypro involved a partial settlement agreement containing an express bar against suits for contribution by nonsettling defendants against settling defendants in a section 10(b) securities fraud suit. The court upheld the bar and outlined a scheme that protected the interests of all parties while, at the same time, encouraging settlement.

> This scheme contemplates a partial settlement approved by the district court under Rule 23. Non-settling defendants are then barred from further rights of contribution from the settling defendants. At trial, the jury is asked not only to determine the total damage amount, but also the percentage of culpability of each of the non-settling defendants as well as that of the settling defendants. Nonsettling defendants as a whole will then be required to pay the percentage of the total amount for which they are responsible. The nonsettling defendants will be jointly and severally liable for that percentage, and will continue to have rights of contribution against one another.

884 F.2d at 1231 (footnote omitted).

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[2] While in the context of federal maritime law and not securities law, *Miller v. Christopher*, 887 F.2d 902, 903-07 (9th Cir. 1989) provides an extensive discussion of the general issues invoked by a good faith settlement bar to actions for contribution.

While *Kaypro* goes far in clarifying the rights of settling and nonsettling defendants in the context of a partial settlement agreement, it provides little direct guidance as to the rights of settling defendants with respect to nonparties.[3] We hold that a settlement agreement cannot be relied upon to bar subsequent actions for contribution by settling defendants against individuals who were not party to the original suit. The logic of allowing defendants to enter into partial settlement agreements, paying damage awards that reflect their culpability relative to other parties in the suit and obtaining protection against subsequent claims for contribution by non-settling defendants, does not bar claims by settling defendants against nonparties.

This holding promotes the three goals identified by the court in *Kaypro*. First, allowing suits against nonparties satisfies the "statutory goal of punishing each wrongdoer." 884 F.2d at 1231. To hold otherwise would immunize an entire category of joint tortfeasors from

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[3] Two other Ninth Circuit cases involve the effect of settlement on subsequent actions for contribution in securities cases. Neither case considers the effect of settlement on nonparties. After *Kaypro, Laventhol, Krekstein, Horwath, & Horwath v. Horwitch*, 637 F.2d 672, 675 (9th Cir. 1980), *cert. denied, Frank v. United States Trust Co.*, 452 U.S. 963 (1981), should be read for the proposition that a settlement, not reflecting the settling defendants' proper share of the damages, will not bar subsequent actions for contribution by nonsettling defendants. *Smith v. Mulvaney* held that summary judgement in an action for contribution by a non-settling defendant against settling defendants was inappropriate if there exists a genuine issue of material fact as to whether the settling defendants paid their "proper share of damages." 887 F.2d at 562.

responsibility and thwart the deterent objective of the laws regulating securities exchanges. Second, allowing suits against nonparties satisfies the "equitable goal of limiting liability to relative culpability." *Id.* Individuals are held accountable for that portion of the common liability for which they are culpable relative to the universe of all joint tortfeasors, and not simply relative to those individuals named by the plaintiff in the original action. Finally, allowing suits against nonparties satisfies the "policy goal of encouraging settlement." *Id.* Named defendants will be more likely to settle if they are not penalized for doing so by being prohibited from pursuing subsequent claims for contribution against nonparties.

The defendants argue that allowing suits against nonparties will prevent litigation from ever being quieted. There is an important difference between quieting existing litigation and barring legitimate and distinct causes of action. The settlement agreement brought to an end the dispute between the *Cousins* plaintiff class and the *Cousins* defendants. The settlement also quieted potential "inter se" claims between the *Cousins* defendants.

There is something inherently "dis-quieting" about contribution claims. These actions threaten to reopen many of the same issues raised in the original controversy. It is also undeniable that, from the standpoint of judicial economy, it is more desirable for all claims to be resolved in a single proceeding. These costs, however, were deemed acceptable in the context of securities law when Congress explicitly provided for contribution, 15

U.S.C. §§ 77k, 78i, and 78r, and implied a right of contribution in section 10(b), a right that can be pursued in a separate cause of action.

Our ruling will not cause an endless stream of contribution claims. The doctrine of contribution contains two important internal checks. No cause of action will lie unless a party has paid more than her share of the total amount of common liability, a sum that is not necessarily equivalent to the amount of the settlement agreement.[4] Second, a party becomes immune from any action for contribution once she has paid her share of the damages.

In the district court, the defendants argued a number of other rationales in support of the 12(b)(6) motion, arguments which have also been briefed on appeal. The district court did not base its decision on these grounds. Moreover, we find the arguments to be without merit. The claims of judicial and collateral estoppel relating to representations and findings that the *Cousins* settlement constituted the defendants "fair share" of the total damages are misguided for the same reason that an action of contribution exists: "fairness" in the *Cousins* context was limited to an "inter se" assessment.

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[4] Economic incentives continue to favor impleading a party in a third party action rather than seeking contribution in a separate suit. Besides the additional costs involved in a separate action, the impled party must pay her relative share of the total settlement amount, whereas damages in a separate suit are limited to the amount the settling defendant paid in excess of her share of the total amount of actual damages. The later sum will always be a smaller amount if the settlement amount is discounted in any fashion.

Defendants claim that no action for contribution can exist because, given insureds position in *Cousins*, they cannot be *joint* tortfeasors. This argument fails to recognize that, in the present action, the Insurers contend that at least some of the insureds were wrongdoers. Moreover, the primary authority relied upon by the defendants, *In re Agent Orange Product Liability Litigation*, 818 F.2d 204, (2nd Cir. 1987), is distinguishable. In that case the appellants maintained, *in the action for contribution*, that Agent Orange caused no harm. The court indicated that the situation would be different if the "appellants would abandon their 'no-fault' stance." *Id.* at 207.

Finally, the defendants assert that the doctrine of "superior equities" should bar the Insurers' claim for contribution. Our decision is guided by federal securities statutes and the federal common law. *Kaypro*, 884 F.2d at 1228. The defendants can cite no case supporting the existence of a doctrine of "superior equities" in this setting, nor do we find the reasoning persuasive enough to import the requirement. The long-standing bar against claims for indemnification in securities cases, *see Laventhol*, 637 F.2d at 676; *Heizer Corp.*, 601 F.2d at 334, and the rule that damages in actions for contribution are determined by a standard of relative culpability, *see Smith v. Mulvaney*, 827 F.2d at 561, are sufficient to protect the equitable interests of the parties.

The plaintiffs have successfully stated a claim upon which relief may be granted. The 12(b)(6) motion should have been denied.

REVERSED AND REMANDED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY, Plaintiffs, v. MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, KMG MAIN HURDMAN, PEAT, MARWICK, MAIN & CO., J. H. COHN & CO., ED BACANI, ROBERT TORKAR, DOES 1 through 100, and ROES 1 through 300, Inclusive, Defendants.	No. 89-0705-JLI(BTM) MEMORANDUM DECISION AND ORDER (Filed Apr. 10, 1990)

The defendants' motions for a contempt order, dismissal or disqualification of the plaintiffs' counsel, dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), and the striking of "Doe" and "Roe" defendants came on for hearing on April 2, 1990, at 10:30 a.m. before the Honorable J. Lawrence Irving, District Judge. Lawrence Nagler, Larry Goldberg and Harry Rebhuhn appeared on behalf of the plaintiffs. William Reifman appeared for the defendants Peat Marwick Main & Co. ("Peat") and K.M.G. Main Hurdman ("Main"), and Alvin Stein appeared on behalf of the defendants J. H. Cohn &

Co. ("Cohn"), Ed Bacani and Robert Torkor. Charles Bird appeared for the defendants Musick Peeler & Garrett ("Musick"), Leonard Castro and Robert Schuchard.

Having considered all pleadings, declarations and the written and oral arguments of counsel and law in support thereof, the Court hereby: (1) grants the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6); (2) denies defendants' motion for a contempt order, dismissal or disqualification of the plaintiffs' counsel; and (3) grants the defendants' motion to strike the "Doe" and "Roe" defendants.

FACTS

This case arises as a direct result of the settlement of *In Re Cousins Securities Litigation*, No. 84-1821-B(IEG) ("*Cousins*"). *Cousins* was a large class action in which shareholders of the Cousins Corporation ("Cousins") charged Cousins, the holding company of Cousins, various Cousins officers and directors, and two lead underwriters with violation of the federal securities laws through the omission of material facts in connection with the sale of stock during a December 1983, public offering ("Cousins public offering"). The case ultimately settled, and the defendants and their insurance carriers agreed to pay the plaintiffs $13,500,000.

Prior to settlement, United States Magistrate Irma E. Gonzalez held two hearings in order to determine whether the proposed settlement had been made in good faith. The purpose of these hearings, as enumerated by the *Cousins* parties, was to determine whether the settling defendants were going to pay "a fair, reasonable and

adequate proportion of the total damages sought based upon the claims asserted by the Settlement Class Members. . . . " Stipulation of Settlement, *In Re Cousins Securities Litigation*, No. 84-1821-B(IEG), at 14 (June 17, 1988) (Exhibit 4 to the Request that Court Take Judicial Notice of the defendants Peat and Main). At the second, final hearing, magistrate Gonzalez held that "the settlement set forth in the stipulation represents the settling defendants' fair or proper share of the total damages sought by the plaintiffs for alleged violations of Federal Securities laws. . . . " Transcript of Good Faith Hearing Re Settlement, *In Re Cousins Securities Litigation*, No. 84-1821-B(IEG), at 5 (August 29, 1988).

The plaintiffs to the instant case are Employers Insurance of Wausau ("Wausau") and Federal Insurance Company ("Federal"), the two carriers that insured most of the *Cousins* defendants. On behalf of their insureds, the plaintiffs have already paid a large portion of the *Cousins* settlement sum.

The plaintiffs believe that the defendant lawyers and accountants should be held partly responsible for the injuries allegedly suffered by the *Cousins* plaintiffs. They therefore have brought this suit for contribution and indemnity against: (1) Musick, the law firm that worked on the Cousins public offering; (2) Peat, an accounting firm involved with the Cousins public offering; (3) Main, another accounting firm involved with the Cousins public offering; (4) Cohn, another accounting firm involved with the Cousins public offering; (5) Leonard Castro and Robert Schuchard, two Musick partners; (6) Ed Bacani and Robert Torkar, two Cohn partners; and (7) various "Doe" and "Roe" defendants. The plaintiffs allege that

these the defendants are jointly and severally liable for any securities frauds perpetrated upon the *Cousins* plaintiffs.

The plaintiffs' first amended complaint, filed on July 18, 1989, seeks the following relief: (1) contribution by Musick and its partners under federal law for violations of Section 10(b) and Rule 10b-5 of the 1933 Federal Securities Exchange Act ("Exchange Act"); (2) equitable indemnity from Musick and its partners under state law for violations of Section 10(b) and Rule 10b-5 of the Exchange Act; (3) contribution by Peat, Main, Cohn and the Cohn partners under state law for violations of Section 10(b) and Rule 10b-5 of the Exchange Act; (4) equitable indemnity from Peat, Main, Cohn, and the Cohn partners under state law for violations of Section 10(b) and Rule 10b-5 of the Exchange Act; (5) contribution by Peat, Main, Cohn and the Cohn partners under federal law for violations of Section 11 of the 1934 Federal Securities Act; (6) equitable indemnity from Peat, Main, Cohn and the Cohn partners under state law for violations of Section 11 of the 1934 Federal Securities Act; (7) equitable indemnity from Peat, Main, Cohn and the Cohn partners under state law for violations of Sections 25401, 25501, 25504.1 and 25504.2 of the California Corporations Code; (8) equitable indemnity from Musick and its partners under state law for negligence; and (9) equitable indemnity from Peat, Main, Cohn and the Cohn partners under state law for negligence.

In response to the complaint, the defendants have filed the following motions: (1) motion to dismiss under Federal Rule of Civil Procedure 12(b)(6); (2) motion for

contempt order, dismissal or disqualification of the plaintiffs' counsel; and (3) motion to strike the "Doe" and "Roe" defendants.

DISCUSSION

1. Motion to Dismiss For Failure to State A Cause of Action Upon Which Relief Can Be Granted

The defendants argue that dismissal of this suit is warranted under Rule 12(b)(6) of the Federal Rules of Civil Procedure because under *Franklin v. Kaypro*, 884 F.2d 1222 (9th Cir. 1989), the plaintiffs have failed to state a cause of action upon which relief can be granted. F.R.Civ.P. 12(b)(6). In *Kaypro*, a Ninth Circuit panel[1] determined that under the federal common law the contribution rights of non-settling defendants against settling defendants in federal securities actions are cut off once a court determines that the settlement has been made in good faith. *Id*. The court held that during trial of such cases the jury should be asked to determine the total dollar amount of damages as well as the percentage of culpability of all settling and non-settling defendants. *Id*. at 1231. Non-settling defendants as a whole are then required to pay the percentage of the total amount for which they are found responsible. *Id*.

The *Kaypro* court follows a long line of Ninth Circuit cases which emphasize that equity must not be sacrificed by the right to contribution; no defendant should ever be

[1] The panel was made up of Judges Farris, Beezer and Ferguson.

held responsible for more than his or her "fair share" of the total liability. In *Smith v. Mulvaney*, 827 F.2d 558, 561 (9th Cir. 1987), the Ninth Circuit found that "[c]ontribution is an equitable doctrine. To apportion damages without regard to fault reduces, to an extent, the equity which the doctrine was intended to provide."

The *Kaypro* court specifically reiterates this concern as it relates to securities class actions. It states: "Although we do not lose sight of the fact that we are speaking of equities between wrongdoers, we decline to back away from our goal of equity." *Kaypro*, 884 F.2d at 1231. Thus, under *Kaypro*, once a defendant has settled, his or her share of the liability has been satisfied, and he or she is protected from suits for contribution. *Id*. Alternatively, he or she cannot seek contribution from non-settling defendants if he or she settles for a sum larger than the ultimate trial verdict. *Id*. at 1231-32.

The defendants argue that it follows, *a fortiori*, that settling defendants who have paid their "fair share" should not be able to enjoy contribution from non-parties. Such a reading of *Kaypro* is consistent with prior authority. The federal courts in general have consistently held that a party has a right to contribution only when he or she has paid more than his or her fair share of the liability. In *Northwest Airlines, Inc. v. Transport Workers of America*, 451 U.S. 77, 87-88 (1981), the Supreme Court held that a right to contribution is recognized when two or more persons "are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability." A court in the Eastern District of California expanded upon this holding by stating that the right of contribution may be enforced

only if one of two or more joint wrongdoers has paid more than his or her pro rata share of the liability. *Harrison v. Sheats*, 608 F. Supp. 502, 505 (E. D. Cal. 1985).

To refute this conclusion, the plaintiffs rely upon *Dube v. Pittsburgh-Corning Corp.*, 1988 WL 64733 (U.S.D.C., D. Me. 1988), *aff'd in part and rev'd in part*, 870 F.2d 890 (1st Cir. 1989), in which the district court of Maine permitted four settling defendants to sue a non-party for contribution. *Dube*, however, is not inconsistent with the defendants' argument. In *Dube*, four settling asbestos manufacturers sued the United States, a non-party, for contribution. In an unpublished opinion, the *Dube* court applied Maine law and held that the settling defendants had a right to contribution because the United States was partially responsible for the damages incurred. *Id.* at 9. In making this determination, the *Dube* court decided the relative culpability of the four settling defendants and of the United States, a determination that, unlike the situations in *Northwest* and *Harrison*, had not previously been made. Deciding that the settling defendants were only responsible for two-thirds of the settlement amount, the court, like those in *Northwest* and *Harrison*, required them to pay only this "fair share." *Id.*

In support of their assertion that contribution is appropriate, the plaintiffs also rely on a number of California cases. Yet the plaintiffs' reliance on these cases is misplaced; the cases, which are non-binding authority, concur with defendants' argument. For example, in *American Bankers Insurance Co. v. Avco-Lycoming Division*, 97 Cal. App. 3d 732, 159 Cal. Rptr. 70 (1979), the California Court of Appeals held that a settling defendant who agreed to pay the full amount of a plaintiff's claim had a

right to contribution from a co-defendant who had been dismissed from the case as part of the settlement. This is exactly the situation in *Dube*. The settling defendant had assumed total responsibility for the injuries the plaintiff suffered, thereby paying *more* than his pro rata share of liability. *Id.* Under the "fair share" doctrine, the settling defendant was entitled to sue his co-defendants for contribution.

Thus, the question in the instant case is: was the amount for which the *Cousins* parties settled deemed to be the settling defendants' "fair share" of the total liability or was it meant to compensate the *Cousins* plaintiffs for all the injuries they incurred? In reviewing the documents relating to the *Cousins* good faith settlement hearing, it is clear that all the *Cousins* parties understood and the *Cousins* court held that the $13,500,000 for which the plaintiffs settled was meant to encompass only the "fair share" of the settling defendants' liability. In their motion for a determination of good faith settlement, the *Cousins* defendants asked the court to determine that the settlement with the plaintiffs was made in good faith and that the defendants were "paying directly or by their insurers a *fair and proper share* of the total damages sought *against them* in the action." Defendants' Notice of Motion and Motion for a Determination of Good Faith Settlement, *In Re Cousins Securities Litigation*, No. 84-1821-B(IEG), at 2 (July 11, 1988) (emphasis added). In the stipulated settlement, the parties agreed that the settling defendants were "paying, directly or by their Insurers, a fair, reasonable and adequate proportion of the total damages sought based upon the claims asserted by the Settlement Class Members. . . . " Stipulation of Settlement, *In Re Cousins*

Securities Litigation, No. 84-1821-B(IEG), at 14 (June 17, 1988). In a declaration in support of a *Cousins* defendant's motion for a good faith settlement determination, David Stern, counsel to Cousins, asserted that the settling defendants were paying, directly or by their insurers, "a fair and proper share of the total damages sought against them in the action." Declaration of David B. Stern in Support of Defendant's Motion for Good Faith Settlement Determination, *In Re Cousins Securities Litigation*, No. 84-1821-B(IEG), at 1 (July 11, 1988). Finally, at the last good faith settlement hearing, Magistrate Gonzalez specifically stated: "I find that the settlement set forth in the stipulation represents the settling Defendants' *fair or proper share* of the total damages sought by the Plaintiffs for alleged violations of the Federal securities laws and, when viewed in the totality of the circumstances, the settlement of the Federal causes of action is fundamentally fair and equitable." Transcript of Good Faith Hearing Re Settlement, *In Re Cousins Securities Litigation*, No. 84-1821-B(IEG), at 5 (August 29, 1988) (emphasis added).

In opposition, the plaintiffs point to the following statement made by Mr. Bertrand Cooper, attorney for one of the defendants, at the first good faith settlement hearing:

> [T]here is a possibility that some or all of the carriers, insurance carriers, may wish to assert rights over, or possible rights over, that their assured have against third parties, I think notably accountants and/or lawyers; that the releases, to the extent releases are given by insureds to insurers, should be crafted in such a way so that if those accountant and lawyers against whom claims over are asserted, assert

> claims back against the insureds who are settling here, those insureds are not giving up any rights they may have under those insurance policies by virtue of any release in this action.

Transcript of Good Faith Hearing, *In Re Cousins Securities Litigation*, No. 84-1821-B(IEG), at 19 (March 11, 1988). The plaintiffs argue that this language proves that the *Cousins* court specifically contemplated and approved the instant suit. They argue that this Court is accordingly required to uphold the terms of the *Cousins* settlement, as determined by Magistrate Gonzalez.

The plaintiffs read too much into this language. Although Mr. Cooper's statements indicate that the *Cousins* court was advised by one attorney of the possibility of a contribution suit against the lawyers and accountants who worked on the Cousins public offering, at no point did the *Cousins* court express its approval of such a cause of action. Since the court passed on the statements without comment, Mr. Cooper's words do not bind this Court to deny the defendants' motion to dismiss.

The Court is further influenced by another concern enunciated in *Kaypro* – that of encouraging settlement. The *Kaypro* court explicitly recognized "an overriding public interest in settling and quieting litigation . . . in class action suits. . . . " *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) (*citing Von Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). Indeed, prohibiting the satisfaction of contribution rights prior to trial effectively eliminates partial settlements because "[a]nyone foolish enough to settle without barring contribution is courting disaster. They are allowing the total

damages from which their ultimate share will be derived to be determined in a trial where they are not even represented." *In Re Nucorp Securities Litigation*, 661 F. Supp. 1403, 1408 (S. D. Cal. 1987).

The Court's denial of the defendants' motion to dismiss would result in just such a disaster. As Mr. Stein indicated at oral argument, his clients will feel compelled to implead the *Cousins* plaintiffs if this case proceeds. Indeed, Mr. Nagler, the plaintiffs' counsel, has admitted that pursuit of this case might require him to put on a case against the very insureds whose interests his clients are supposed to protect. The result would be as if *Cousins* had never settled; all issues relating to that action would still have to be resolved in a very long and expensive trial. Given this Court's interest in promoting settlement[2] and for the other reasons stated, the defendants' motion to dismiss is hereby granted.

2. Motion for Contempt Order, Dismissal or Disqualification

The defendants argue that the plaintiffs are in contempt of court because, in framing their complaint, they

[2] Settlements are desirable, not just because trials are costly but because they allow parties to " 'manage their own disputes' and avoid the uncertainties and limitations of the winner-take-all, imposed decisions that courts make in fully litigated cases. Settlement also offers privacy to litigants and enables them to consider opportunities for resolutions that would not be available in a trial judgment." D. Provine, *Settlement Strategies for Federal District Judges*, at 1-2 (1986).

relied on protected information acquired through discovery of the *Cousins* case. The defendants believe that two protective orders issued by Judge Rudi M. Brewster expressly prohibit the *Cousins* parties from using such information for any purpose other than preparation for the *Cousins* trial.

Extensive discovery took place in preparation for the *Cousins* trial. During the course of discovery, Judge Brewster, the judge who presided over *Cousins*, entered two protective orders to which each *Cousins* party stipulated. The first protective order ("global order") was issued on January 23, 1985. The second protective order was issued at the request of Main, an interested non-party, and was filed on August 6, 1985. The global order contained language providing that: "All information produced or exchanged in the course of this case shall be used solely for the purpose of this case only and shall not be made available to persons other than qualified persons. . . . " Stipulation and Protective Order, *In Re Cousins Securities Litigation*, No. 84-1821-B(IEG), at 2 (Jan. 23, 1985) (Exhibit 2 to the Request that Court Take Judicial Notice of the defendants Peat and Main). In addition, the global order instituted a procedure whereby certain documents could be labeled "confidential"; all "confidential" materials were to be filed under seal. *Id.* at 6. The second order stated: "All documents produced and deposition testimony given by Main Hurdman in this action are deemed to be confidential, shall be used solely for the purpose of this case and shall not be made available. . . . " Stipulation and Protective Order, *In Re Cousins Securities Litigation*, No. 84-1821-B(IEG), at 2 (August 6, 1985)

(Exhibit 3 to the Request that Court Take Judicial Notice of the defendants Peat and Main).

Although the plaintiffs' attorneys admit that they have based their complaint upon information acquired during discovery of *Cousins*, they correctly argue that this Court does not have the power to order them in contempt. Here the plaintiffs are charged with violating two orders issued by Judge Brewster. It has long been established that a party who violates a court order may only be held in contempt by the court that issued the order. *In Re Debs*, 158 U.S. 564, 594-95 (1895). Accordingly, only Judge Brewster has the power to order these plaintiffs in contempt. *Id.; see Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279 (5th Cir. 1989) ("We are aware of no basis upon which a district court may assert subject matter jurisdiction over violations of orders issued in other federal courts."). Thus, this Court denies the defendants' request for a contempt order.

Nor is dismissal of the complaint appropriate. Despite the defendants' assertions to the contrary, it is unclear whether the defendants violated the protective orders issued by the *Cousins* court. Both protective orders prohibit the provision of information to "qualified persons," or persons in direct competition with one or more of the *Cousins* parties. Stipulation and Protective Order, *In Re Cousins Securities Litigation*, No. 84-1821-B(IEG), at 2-3 (Jan. 23, 1985); Stipulation and Protective Order, *In Re Cousins Securities Litigation*, No. 84-1821-B(IEG), at 2-4 (August 6, 1985). Neither contemplates nor expressly disallows the filing of a law suit based on such information. It is therefore unclear whether the orders apply to such a situation. *See* Declaration of Larry Goldberg, at 2-3

(Exhibit 9 to The plaintiffs' Request that Court Take Judicial Notice). Accordingly, this Court cannot conclude that the plaintiffs have exercised blatant disregard for Judge Brewster's orders, and this Court denies the defendants' motion to dismiss. *See North American Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986) (dismissal was warranted only in *extreme* case of refusal to abide by court's order).

The motion to disqualify the plaintiffs' counsel is also denied. As discussed above, it is unclear whether the plaintiffs violated the *Cousins* protective orders; both parties can point to language in the orders that supports their interpretations of the court's intent. Declaration of Larry Goldberg, at 2-3 (Exhibit 9 to the Plaintiffs' Request that Court Take Judicial Notice). Yet even if it is determined that the plaintiffs did violate the protective orders,[3] the plaintiffs counsel should not be prevented from pursuing this case. When there is a genuine misunderstanding as to the meaning of a protective order, disqualification is inappropriate. *See Syufy Enterprises v. Columbia Pictures Industries, Inc.*, 1978-2 Trade Cases P. 62,170 1978 WL 1372 (D. Utah 1978).

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[3] This issue is specifically reserved for resolution by Judge Brewster. As the judge who issued the two orders in question, his court is the one most qualified to decide whether a violation has occurred.

3. Motion to Strike the "Doe" and "Roe" Defendants

Finally, the defendants argue that since the Federal Rules of Civil Procedure make no provision for the naming of "Doe" and "Roe" defendants, the "Doe" and "Roe" defendants named in the instant case should be stricken from the complaint. As support for this proposition, they cite *Lubin v. Sybedon Corp.*, 688 F. Supp. 1425 (S. D. Cal. 1988), in which the court held that "Doe" defendants may not be named in federal securities actions. Other Ninth Circuit opinions support the *Lubin* decision. *See, e.g., Fifth Associates v. Prudential Insurance Co. of America*, 446 F.2d 1187, 1191 (9th Cir. 1970) (a suit naming "Doe" defendants may not be maintained in federal court).

In opposition to the defendants' motion to strike the "Doe" and "Roe" defendants, the plaintiffs argue that California law allows for the naming of "Doe" defendants, thereby "relating the complaint back" to the time of filing. California law, however, is irrelevant here; although the California "relation back" doctrine has been deemed substantive,[4] the rule as to naming "Doe" defendants is clearly procedural. Accordingly, Ninth Circuit authority on the naming of "Doe" defendants applies to this case. Under such authority, this Court hereby grants the defendants' motion to strike the "Doe" and "Roe" defendants.

---

[4] *See Lindley v. General Electric Corp.*, 780 F.2d 797 (9th Cir. 1986).

CONCLUSION

1. The defendants' motion to dismiss for failure to state a cause of action is hereby granted. The Court finds that the plaintiffs who, on behalf of their insureds, have paid no more in settlement of *Cousins* than that which was their fair share of liability, are not entitled to sue the defendants for contribution, and allowing this action to go to trial would vitiate this Court's interest in encouraging settlement.

2. The defendants' motion for a contempt order, dismissal or disqualification is hereby denied. The Court finds that it does not have the authority to find the plaintiffs in contempt of court and that dismissal and disqualification are inappropriate because the plaintiffs have not exercised blatant disregard for the two *Cousins* protective orders.

3. The defendants' motion to strike the "Doe" and "Roe" defendants from the complaint is hereby granted. The Court finds that the naming of "Doe" and "Roe" defendants is not permitted in federal court.

IT IS SO ORDERED.

Dated: April 9, 1990

/s/ J. Lawrence Irving
J. LAWRENCE IRVING, JUDGE
UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Employers Insurance of Wausau and Federal Insurance Company

v.

Musick, Petter & Garrett, Leonard Castro, Robert Schuchard, KMG Main Hurdman, Peat, Marwick, Main & CO et al

JUDGMENT IN A CIVIL CASE

(Filed Apr. 12, 1990)

CASE NUMBER: 89-0705-JLI(BTM)

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendants' motion to dismiss for failure to state a cause of action is hereby granted. The defendants' motion for a contempt order, dismissal or disqualification is hereby denied. The defendants' motion to strike the "Doe" and "Roe" defendants from the complaint is hereby granted .....

April 12, 1990
Date

WILLIAM W. LUDDY
Clerk

/s/ Mary Miramontes
(By) Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMPLOYERS INSURANCE OF WAUSAU; FEDERAL INSURANCE COMPANY Plaintiffs - Appellants, v. MUSICK, PELLER & GARRETT, a Partnership; LEONARD CASTRO, an Individual; ROBERT SCHUCHARD, an Individual; K.M.G. MAIN HURDMAN, a Partnership; PEAT, MARWICK, MAIN & CO., a Partnership; J.H. COHN & CO., a Partnership; ED BACANI, an Individual; ROBERT TORKAR, an Individual; DOES 1 thru 100; and DOES 1 thru 300, Inclusive, Defendants - Appellees.	No. 90-55791 D.C. No. CV-89-705-JLI O R D E R (Filed May 28, 1992)

Before: GOODWIN, PREGERSON, ALARCON, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Pregerson and Alarcon have voted to reject the suggestion for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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ec
90-55791

Supreme Court, U.S.
FILED
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No. 92-34

In The

Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR,

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 92-34

In The

Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR,

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Employers Insurance of Wausau and Federal Insurance Company, respectfully pray that this Court decline to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, dated January 23, 1992.

STATEMENT OF THE CASE

Employers Insurance of Wausau ("Wausau") and Federal Insurance Company ("Federal") contributed $13 million towards a $13.5 million settlement between class action plaintiffs and all named defendants in *In re Cousins Securities Litigation*, No. 84-1821-B(IEG) ("Cousins"). In connection with this settlement, the defendants sought and obtained a full release from the plaintiff class of 100% of their claims, including those against all named defendants, as well as those against the non-named lawyers and accountants who provided expert advice in connection with a $30,000,000 public offering.

Wausau and Federal, as subrogees of the insureds, filed this action seeking contribution (the subject of the instant petition) from the lawyers and accountants for the *Cousins* defendants. Although it is alleged in this contribution action that these lawyers and accountants bore the primary responsibility for the shareholder plaintiffs' losses, for whatever reason they were not named in the underlying *Cousins* litigation. To deny a right of contribution action against the lawyers and accountants would thrust the entire liability on settling defendants who were perhaps only fractionally at fault, and would allow tortfeasors that were the main cause of plaintiffs' loss to escape liability completely.

I.

THE RIGHT OF IMPLIED CONTRIBUTION UNDER SECTION 10(b) AND RULE 10b-5 HAS BEEN RECOGNIZED THROUGH JUDICIAL INTERPRETATION FOR ALMOST A QUARTER OF A CENTURY

A. Contribution is Now a Well-established Equitable Doctrine Which Allows Joint Tortfeasors to Apportion Their Liability

Contribution is an equitable doctrine which allows defendants to require joint tortfeasors, even those not named by the plaintiff, to bear their fair burden of the plaintiff's damage award. *Nelson v. Bennett*, 662 F. Supp. 1324, 1327-28, (E.D. Cal. 1987). This is a modification of the English common law rule that intentional joint tortfeasors were not able to seek contribution from one another. *Id.* at 1328, citing Restatement (Second) of Torts § 886(A)(3) (1977); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 557 (5th Cir 1981), *aff'd and rev'd in part on other grounds* 459 U.S. 375 (1983). The no-contribution rule was gradually eroded on the equitable basis that it was unfair to require one defendant to bear the entire loss resulting from injury that he or she had not alone caused, or to permit the plaintiff for whatever motive, benign or invidious, to select one defendant from which he or she wished to recover. *Huddleston*, 640 F.2d at 557.

Today, most states permit some form of contribution among joint tortfeasors, even though there is little uniformity among the various state statutes and decisions, as well as great variation in both the measure of damages and the effect of a settlement on the right to contribution.

Alvarado Partners, L.P. v. Mehta, 723 F. Supp. 540, 549 (D. Colo. 1989), *appeal dismissed without opinion*, 936 F.2d 582 (10th Cir. 1991).

Proponents of the right to contribution recognized the inherent unfairness of thrusting the entire liability on one defendant who was only partially at fault. Defendants with little monetary resources, and sometimes equally small liability, were often compelled to settle with the plaintiff at an exaggerated price to avoid the potentially catastrophic consequence of solitary responsibility and the exaggerated costs of complex litigation. Because of plaintiff's superior negotiating strength, proscription of the right to contribution encourages collusion and bribery between the plaintiff and potential defendants. Actions for contribution benefit both the plaintiff and the legal system by facilitating discovery as defendants who were involved in a common scheme are often in a better position to demonstrate the relative culpability of their confederates. Also, plaintiff's prospect of full recovery is improved because contribution permits joinder of all potential defendants in the original action. Lastly, because contribution affects a greater number of tortfeasors, it produces a larger, although diluted, deterrent effect. O'Shaughnessy, *Judicial Implication of Contribution Under Section 10(b) of the Securities Exchange Act: Is the New Branch on the Judicial Oak Threatened by Strict Statutory Construction?*, XVI Suffolk U.L. Rev. 983, 988-89, (1982).

B. The Parameters of Section 10(b) and Rule 10b-5 Have Developed Almost Exclusively Through Judicial Interpretation

1. A Private Right of Action Under Section 10(b) and Rule 10b-5 Developed Through Judicial Interpretation and Application

While state tort law regarding contribution has developed largely through statutes, contribution in the context of the securities laws has been expanded primarily through judicial interpretation. Note, *All Things Being Unequal: Use of the Doctrine of Relative Culpability in Apportioning Contribution, Smith v. Mulvaney*, 827 F.2d 558 (9th Cir. 1987) 57 U. Cin. L. Rev. 769, 772 (1988). The federal securities laws were passed in the 1930's in the aftermath of the 1929 market crash. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 (1976). Although neither Section 10(b) nor Rule 10b-5 created an express civil remedy, nor is there any indication that Congress or the Securities and Exchange Commission contemplated such a remedy, a private cause of action for violation of the statute and the rule has become well established through judicial interpretation. *Id.* at 196; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975); *Heizer v. Ross*, 601 F.2d 330, 331-32 (7th Cir. 1979). This Court has acknowledged that the private right of action under Section 10(b) is "a judicial oak which has grown from little more than an acorn." *Blue Chip Stamps*, 421 U.S. at 737. "[A] private right of action under Section 10(b) of the 1934 Act and Rule 10b-5 has been consistently recognized for more than 35 years. The existence of this implied remedy is simply beyond peradventure." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 & n.10 (1983).

2. The Implied Right of Contribution Is a Necessary Remedy to the Implied Private Cause of Action Under Section 10(b) and Rule 10b-5

With the establishment of a private right of action, the courts continued in their process of defining the scope of Section 10(b) and Rule 10b-5 and it became necessary to define remedies available to private parties damaged by violations of those provisions. *Alvarado Partners*, 723 F. Supp. at 550. First the courts determined the availability of contribution in securities fraud cases was a matter of federal law, and where that availability was to be implied, a matter of federal common law. *Heizer*, 601 F.2d at 331; *accord Huddleston*, 640 F.2d at 557. The courts then reasoned that the existence of a statutory right implied the existence of all necessary and appropriate remedies; and the power to make the right of any recovery effective implied the power to utilize any procedures or actions normally available to a litigant according to the exigencies of the litigant's case. *Heizer*, 601 F.2d at 332.

The 1968 case of *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809, (1968) *aff'd in part, rev'd in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970), was the first case to imply a right of contribution in favor of a defendant whose liability had been established by an implied private cause of action under Section 10(b). In *deHaas*, the defendant corporation brought a contribution claim against its corporate counsel for the latter's alleged misrepresentations in connection with a corporate reorganization. *Id.* at 815. The court reasoned that contribution should be permitted when liability is implied under Section 10(b) because contribution is explicitly authorized by

the express civil liability provisions of the securities laws. *Id.* at 815-16.[1]

Two years later, a federal district court in *Globus v. Law Research Service, Inc.*, 318 F. Supp. 955, 957-58, (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971), implying contribution, relied on *deHaas*, and recognized that the general trend of current law was towards the allowance of contribution among joint tortfeasors. The Seventh Circuit in *Heizer*, 601 F.2d at 331-32, held that judicial implication of contribution under Section 10(b) was a matter of federal common law and that other express civil remedies expressly provide for contribution.[2]

In *Huddleston*, 640 F.2d at 558 the Fifth Circuit relied on the rationale of *Heizer, supra*, and determined that allowing implied contribution under Rule 10b-5 satisfies the objective of deterrence under the securities laws as explained more fully below. Thus, it was with the weight of, and citation to, these Circuit Court cases as precedent that the Ninth Circuit stated in *Smith v. Mulvaney*, 827 F.2d 558,

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[1] These express contribution sections are Securities Exchange Act of 1934, §§ 9, 18, 15 U.S.C. §§ 78i, 78r; Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f).

[2] The Seventh Circuit in *King v. Gibbs*, 876 F.2d 1275 (7th Cir. 1989) severely criticized *Heizer v. Ross*, 601 F.2d 330, but did not overrule it. *King* is limited to whether the federal courts may imply *indemnity* in the context of the securities laws and such holding is entirely consistent with *Heizer*, 601 F.2d at 334. Thus because the issue of contribution was not before the court in *King*, Respondents cite *Heizer v. Ross* as good precedent.

560 (9th Cir. 1987): "We hold that an implied right of contribution exists under Section 10(b) and Rule 10b-5. This is in accord with the other circuits that have decided this issue."

Since *deHaas, Globus, Heizer, Huddleston, and Mulvaney* federal courts considering the question of implied contribution have also, with few exceptions, held that a right to contribution exists in actions under Section 10(b) and/or Rule 10b-5.[3] In so implying contribution, courts have

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[3] **First Circuit:** District Courts – *MFS Mun. Income Trust v. American Medical Intern.*, 751 F. Supp. 279 (D. Mass. 1990); *In Re Atlantic Financial Management, Inc. Securities Litigation*, 748 F. Supp. 1012 (D. Mass. 1988). **Second Circuit: Court of Appeals** – *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721 (2d Cir. 1981); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566 (2d Cir. 1982), *cert. denied*, 459 U.S. 838, *cert. denied*, 459 U.S. 908; *Globus, Inc. v. Law Research Service*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir. 1971), *cert. denied*, 404 U.S. 941 (1971). **District Courts** – *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620 (S.D.N.Y. 1972); *Herzfield v. Laventhol, Krekstein, Horwath, & Horwath*, 378 F. Supp. 112 (S.D.N.Y. 1974), *aff'd in part, rev'd in part*, 540 F.2d 27 (2d Cir. 1976); *Liggett & Myers Inc. v. Bloomfield*, 380 F. Supp. 1044 (S.D.N.Y. 1974); *Alexander & Baldwin, Inc. v. Peat, Marwick, M. & Co.*, 385 F. Supp. 230 (S.D.N.Y. 1974); *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946 (S.D.N.Y. 1975); *Rice v. McDonnell & Co.*, 442 F. Supp. 952 (S.D.N.Y. 1977); *Stratton Group, Ltd. v. Sprayregen*, 466 F. Supp. 1180 (S.D.N.Y. 1979); *Noonan v. Granville-Smith*, 532 F. Supp. 1007 (S.D.N.Y. 1982) *opinion supplemented by* 535 F. Supp. 333 (S.D.N.Y. 1982); *Greene v. Emerson Ltd.*, 102 F.R.D. 33 (S.D.N.Y. 1983), *aff'd on other grounds, Kenneth Leventhal & Co. v. Joyner Wholesale Co.*, 736 F.2d 29 (2d Cir. 1984); *Jordan v. Madison Leasing Co.*, 596 F. Supp. 707 (S.D.N.Y. 1984); *Pepsico, Inc. v. Continental Casualty Co.*, 640 F. Supp. 656

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both looked to statutory interpretation as well as policy considerations.

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(S.D.N.Y. 1986); *Department of Economic Development v. Arthur Andersen & Co.*, 747 F. Supp. 922 (S.D.N.Y. 1990); *Department of Economic Development v. Fetherston*, 739 F. Supp. 804 (S.D.N.Y. 1990); *In Re Crazy Eddie Securities Litig.*, 740 F. Supp. 149 (E.D.N.Y. 1990); *McCoy v. Goldberg*, 778 F. Supp. 201 (S.D.N.Y. 1991). **Third Circuit: District Courts** – *Gould v. American-Hawaiian Steamship Co.*, 387 F. Supp. 163 (D.Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); *B & B Inv. Club v. Kleinhart's Inc.*, 391 F. Supp. 720 (E.D.Pa. 1975); *Muth v. Dechert, Price & Rhoads*, 391 F. Supp. 935 (E.D.Pa. 1975); *McLean v. Alexander*, 449 F. Supp. 1251 (D.Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880 (D.N.J. 1984); *In Re Nat'l Smelting of New Jersey, Inc. Bondholders Litig.*, 722 F. Supp. 152 (D.N.J. 1989). **Fourth Circuit: Court of Appeals** – *In Re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991). **District Courts** – *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 772 F. Supp. 1565 (D.S.C. 1991). **Fifth Circuit: Court of Appeals** – *Kuenhert v. Texstar Corp.*, 412 F.2d 700 (5th Cir. 1969); *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), *aff'd and rev'd in part on other grounds*, 459 U.S. 375 (1983). **District Courts** – *Marrero v. Abraham*, 473 F. Supp. 1271 (E.D.La. 1979); *In Re Terra-Drill Partnerships Sec. Litig.*, 726 F. Supp. 655 (S.D.Tex. 1989). **Sixth Circuit: District Courts** – *Alexander Grant & Co. v. McAlister*, 669 F. Supp. 163 (S.D.Ohio 1987); *Baker v. BP America Inc.*, 749 F. Supp. 840 (N.D.Ohio 1990). **Seventh Circuit: Court of Appeals** – *Madigan, Inc. v. Goodman*, 498 F.2d 233 (7th Cir. 1974); *Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979). **District Courts** – *In Re Olympia Brewing Co. Sec. Litig.*, 674 F. Supp. 597 (N.D.Ill. 1987). **Ninth Circuit: Court of Appeals** – *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 232 (1990); *Smith v. Mulvaney*, 827 F.2d 558 (9th Cir. 1987). *District Courts – Ahern v.*

(Continued on following page)

The *deHaas* court and the other Circuits have relied on statutory construction for the proposition that contribution should be permitted when liability is implied under Section 10(b) because contribution is explicitly authorized by the express civil liability provisions of the securities laws. Also it has been posited that the fact there is explicit authorization of the right to contribution for both negligent and intentional violation of the securities laws is strong evidence that Congress would have permitted contribution under Section 10(b) if it had explicitly created a private cause of action under that section. Adamski, *Contribution and Settlement in Multiparty Actions under Rule 10b-5*, 66 Iowa L. Rev. 533, 539 (1981). Thus, because some of the civil liability sections that expressly allow contribution (Securities Exchange Act of 1934, §§ 9, 18, 15 U.S.C. §§ 78i, 78r) allow for contribution for the equivalent of intentional conduct, contribution ought not to be denied under Section 10(b) or Rule 10b-5 actions merely because those provisions require a finding of scienter.

As for policy reasons, the cases have relied on three: the trend of the law (*Globus*, 318 F. Supp. at 957; *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. at 163, 169 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); the deterrent effect (*Globus*, 318 F. Supp. at 958; *Marreo v. Abraham*, 473 F. Supp. 1271, 1278 (E.D. La.); *Huddleston*, 640 F.2d at 558); and fundamental fairness (*Marreo*, 473 F. Supp. at 1277; *McLean v. Alexander*, 449 F. Supp. 1251, 1266 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979).[4]

As aptly put by this Court: "[I]t would be disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present state of law with respect to Rule 10b-5. It is therefore proper that we consider . . . policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional

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Gaussoin, 104 F.R.D. 37 (D.Or. 1984); *Nelson v. Bennett*, 662 F. Supp. 1324 (E.D.Cal. 1987). **Tenth Circuit: District Courts** – *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540 (D.Colo. 1989), *appeal dismissed without opinion*, 936 F.2d 582 (10th Cir. 1991); *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809 (D.Colo. 1968), *aff'd in part, rev'd in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970). **District of Columbia Circuit: District Courts** – *In Re Nat'l Student Mktg. Litig.*, 517 F. Supp. 1345 (D.D.C. 1981).

[4] In support of the policy reasons allowing contribution it was recognized that "[t]he common law rule precluding intentional wrongdoers from seeking contributions developed long before the evolution of multiparty litigation involving class plaintiffs, numerous defendants vast monetary claims, lengthy trials and enormous litigation costs. The disallowance of contribution in the context of such modern multiparty litigation encourages the presentation of enormous claims against numerous defendants in the hope that at least some of those named will, merely to avoid the heavy cost of litigation, pay a settlement amount rather than defend the action. Thus, the no-contribution rule promotes a rush to settlement whereby certain defendants can purchase freedom from litigation and the ultimate court judgment, simultaneously providing the plaintiffs with funds to finance the continuation of the suit against the non-settling defendants. Moreover, the settling defendants may well extricate themselves from the litigation in exchange for relatively small settlement amounts, leaving the non-settling defendants to bear a much larger liability in the form of the final court judgment." *Huddleston*, 640 F.2d at 558.

enactment nor the administrative regulations offer conclusive guidance." *Blue Chip Stamps*, 421 U.S. at 737.

II.

AFTER ALMOST TWENTY-FIVE YEARS OF IMPLIED CONTRIBUTION, RATHER THAN EVIDENCING A STRONG SPLIT AMONG THE CIRCUITS, THE EIGHTH CIRCUIT'S *CHUTICH V. TOUCHE ROSS & CO.* IS AN ANOMALY

Petitioners' principal contention in their Petition is that somehow the decision of *Chutich v. Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992) abrogates almost a quarter of a century of judicial determinations upholding the right to implied contribution. Instead, *Chutich* is an anomaly, arising from a Circuit and state that deals with a dearth of securities fraud cases.

A. *Chutich v. Touche Ross & Co.* Is Wrongly Decided Having Misapplied *Texas Industries v. Radcliff Materials, Inc.* and *Northwest Airlines v. Transport Workers Union*

For the proposition that contribution should not be implied under Section 10(b) and Rule 10b-5, *Chutich* and two other officially published district court cases rely on two 1981 Supreme Court cases which declined to allow contribution for other unrelated federal private causes of action. However, a variety of federal court opinions since 1981 suggest that the Eighth Circuit's reliance on the two Supreme Court opinions is totally misplaced because the two cases expressly reserved judgment as to whether their reasoning was to be applied in the arena of securities law.

1. Nothing in Either *Texas Industries v. Radcliff Materials Inc.* or *Northwest Airlines v. Transport Workers Union* Mandates That Their Reasoning Should be Applied in the Arena of the Securities Laws

In *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77 (1981), Northwest Airlines sought contribution from two unions after a judgment had been entered against it because of pay disparity between male and female flight attendants, a violation of the Equal Pay Act and Title VII of the Civil Rights Act. Northwest brought its own action against the unions, arguing that it was entitled to contribution because the illegal pay structure had been part of a collective bargaining agreement with the unions. *Id.* at 80-82. This Court concluded Northwest could not claim any right of contribution under either the Equal Pay Act or Title VII. After looking to the text of the statutes and their legislative histories, and emphasizing that the laws were enacted solely to establish statutory rights of the employees as against employers, this Court deemed that Northwest could not be a "beneficiary" under the statutes and was thus barred from seeking contribution. *Ibid.* This Court also included a footnote indicating that it was aware that federal courts had recognized an implied right to contribution under the securities laws where the underlying liability resulted from an implied private right of action, but it specifically stated that it chose not to comment on the merit of those decisions. *Id.* at 91, n.24.

A similar conclusion was reached in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, which involved

the Sherman and Clayton antitrust acts. One of Texas Industries' customers filed a civil antitrust action against it, alleging that Texas Industries, a concrete manufacturer, and other concrete manufacturers had entered into a price fixing conspiracy. *Id.* at 632-33. This Court held that Texas Industries could not seek contribution from the other manufacturers with which it had allegedly conspired. Relying on its reasoning in *Northwest Airlines*, this Court refused to find a right of contribution, emphasizing the absence of contribution in the statutory scheme and held that antitrust violators were not members of the "class" intended to benefit from the antitrust laws. *Id.* at 639-40.

Again, in a footnote, this Court specifically recognized it was aware of the federal courts' implied right to contribution under the securities laws, but, citing to *Northwest Airlines* stated that it did no intimate any view as to the correctness of these decisions. *Texas Industries* at 640 n. 11. This footnote, and the other footnote appearing in *Northwest Airlines*, are the subject of a more extensive discussion below.

B. The Holdings in *Texas Industries v. Radcliff* and *Northwest Airlines v. Transport Workers Union* are Inapposite and Therefore Almost All Federal Courts Since 1981 Have Continued to Imply the Right of Contribution Under Section 10(b) and Rule 10b-5

1. Several Federal Courts Have in Fact Considered the Effect of *Texas Industries v. Radcliff* and *Northwest Airlines v. Transport Workers Union* and Have Found that the Supreme Court Expressly Reserved Judgment on the Question of the Applicability of Its Reasoning to Section 10(b) and Rule 10b-5 Cases

Petitioners contend that federal courts have continued to imply contribution under Section 10(b) and Rule 10b-5 without considering the effect of *Texas Industries* and *Northwest Airlines*. This is simply not the case.

First in *In Re National Student Marketing Litigation*, 517 F. Supp. 1345, 1348 (D.C. 1981), the court held that the defendant (who was seeking to avoid the application of implied contribution under Section 10(b) and Rule 10b-5) could not rely on *Texas Industries* and *Northwest Airlines* for that purpose. The court recognized that the Supreme Court in those two cases dealt only with the two statutory schemes before it. *National Student Marketing* at 1348. In so determining the *National Student Marketing* court relied on a footnote in each of the two Supreme Court cases. *Id.* at 1348-49. First in *Northwest Airlines* this Court determined that:

> "Congress expressly provided for contribution among joint wrongdoers in the Securities Act of

1933, see 15 U.S.C. § 77k(f), and in the Securities Exchange Act of 1934, see 15 U.S.C. §§ 78i(e), 78r(b). Thus, at least in these instances, when Congress wanted to provide a right to contribution, it did so expressly.

A number of federal courts have recognized an implied right to contribution under the securities law where the underlying liability resulted from an implied private right of action. These courts have reasoned that because Congress expressly created a right to contribution to correspond to certain express civil remedies, contribution should also be permitted when liability is based on an implied civil remedy. See e.g. *Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979); *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346, (2d Cir. 1971), *cert. denied* 404 U.S. 941, 92 S.Ct. 286, 30 L.Ed.2d 254. Whatever the merit of this reasoning, a question we do not now address, these decisions provide no support for petitioner in this case." *Northwest Airlines*, 451 U.S. at 91, n.24.

A month later in *Texas Industries* this Court stated:

> "That Congress knows how to define a right to contribution is shown by the express actions for contribution under § 11(f) of the Securities Exchange Act of 1933, 15 U.S.C. §§ 78k(f) and §§ 9(e) and 18(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e) and 78r(b). Some courts have extrapolated from these provisions that when an implied right of action exists under the securities laws, there also is an implied right to contribution. See, e.g., *Heizer Corp v. Ross*, 601 F.2d 330 (7th Cir. 1979); *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y.), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S 9841, 92 S.Ct. 286, 30 L.Ed.2d 254 (1971); *De Haas v. Empire Petroleum Co.*, 286 F. Supp. 809 (Colo. 1968), *aff'd in part, rev'd in part*, 435 F.2d 1223 (10th Cir. 1970). We intimate no view as to the correctness of these decisions; in any event they do not support implication of right to contribution when a statute expressly creates a damages action but does not provide for contribution. See *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 91-92, n.24, 101 S.Ct. 1571, n.24, 67 L.Ed.2d 1451." *Texas Industries*, 451 U.S. at 640, n.11.[5]

Thereafter, the district court in *National Student Marketing* noted that this Court had the opportunity to consider the issue of implied contribution in Federal securities laws a few months after it decided *Texas Industries* and *Northwest Airlines*, but declined to do so by denying certiorari in *Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672 (9th Cir. 1980), *cert. denied*, 452 U.S. 963 (1981) [an action brought under 15 U.S.C. § 78k(a) involving trading by members of exchanges, brokers and dealers]. Respondents here are aware that it is well-settled that a denial of a petition for a writ of certiorari carries with it no implication whatever regarding the Supreme Court's views on the merits of the case the Court declined to review. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1949).

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[5] Respondents wish to point out that Petitioners in their discussion of *Texas Industries* never once mention the famous footnote 11 or *Northwest Airlines'* equally significant footnote 24.

However, in *Herman & MacLean v. Huddleston*, 459 U.S. at 379, this Court considered two issues from the Fifth Circuit case of *Huddleston v. Herman & MacLean*, 640 F.2d 534: 1) whether an implied cause of action under Section 10(b) of the 1934 Act will lie for conduct subject to an express civil remedy under the 1933 Act; and 2) the standard of proof applicable to actions under Section 10(b). Although the Circuit case, *Huddleston*, 640 F.2d at 556-59, extensively discussed and approved the right of implied contribution under Section 10(b) and Rule 10b-5, the Supreme Court, while it had the opportunity, made no comment or criticism of the doctrine when the case was before it on the above two issues.

In the New York case of *Noonan v. Granville-Smith*, 532 F. Supp. 1007, 1008 (S.D.N.Y. 1982), *opinion supplemented* by 535 F. Supp. 333 (S.D.N.Y. 1982), the third-party defendants argued that the Second Circuit decisions allowing contribution, *Globus*, 318 F. Supp. 955, *aff'd per curiam*, 442 F.2d 1346 and *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721 (2d Cir. 1981) would now be overruled in light of the recent Supreme Court decisions in *Texas Industries* and *Northwest Airlines*. The *Noonan* court in rejecting this argument first recognized that the Supreme Court specifically left open the question of *Globus'* continued vitality in the two footnotes. *Noonan* at 1008. Second, both *Texas Industries* and *Northwest Airlines* stressed it was dealing with a specifically created statutory remedy, and reasoned it would be inappropriate to modify the remedy provided by Congress. *Noonan*, at 1008. Here, the *Noonan* court noted, on the other hand, it was dealing with " 'a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one

way or another. . . . ' " *Id.* citing to *Blue Chip Stamps*, 421 U.S. at 749.

Once again, in a New Jersey case, *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880, 885 (D.N.J. 1984), the third-party defendants cited to *Texas Industries* and *Northwest Airlines* for the proposition that no cause of action for contribution should be implied under the securities laws. The *Seiler* court declined to accept this analysis, citing to the two previously discussed footnotes in *Texas Industries* and *Northwest Airlines* whereby the Supreme Court expressly limited its holding to the particular statutory scheme in question and expressed no view about the availability of an implied right of contribution under the securities laws. *Seiler* at 885 citing to *Texas Industries*, 451 U.S. at 640 n.11; *Northwest Airlines*, 451 U.S. at 91 n.24.

The most recent case to disagree that *Texas Industries* and *Northwest Airlines* bar a right to implied contribution under Section 10(b) and Rule 10b-5 is *Baker v. BP America, Inc.*, 749 F. Supp. 840 (N.D. Ohio 1990). The *Baker* court first discussed the facts and holdings in *Northwest Airlines* and *Texas Industries* and the few district court cases that have applied those cases to find no right of contribution under Section 10(b). *Baker* at 843-44. In rejecting that *Northwest Airlines* and *Texas Industries* foreclosed the implied right of contribution under Section 10(b), the court, citing to those cases' two applicable footnotes, noted that "[f]irst, the Supreme Court expressly reserved judgment on the question of applicability of its reasoning to § 10(b) cases. *Northwest Airlines*, 451 U.S. at 91 n.24 . . . ; *Texas Industries*, 451 U.S. at 640 n. 11. . . . Second, *Northwest Airlines* and *Texas Industries* are fundamentally different from this case. *Northwest Airlines* and *Texas Industries*

both dealt with statutory remedies which expressly created a private right of action, at the same time omitting any right of contribution. By contrast, the private right of action under § 10(b) has itself been judicially implied." *Baker* at 844.

2. The Great Majority of Federal Courts Continue to Imply a Right of Contribution Under Section 10(b) and Rule 10b-5

Since the Supreme Court decisions in *Texas Industries* and *Northwest Airlines* in 1981 approximately two dozen federal courts, including the Ninth Circuit in *Smith v. Mulvaney*, 827 F.2d 558, have continued to hold that the implied right of contribution is a viable doctrine under Section 10(b) and Rule 10b-5. As previously discussed, four different courts have discussed why *Texas Industries* and *Northwest Airlines* are inapposite; the other courts did not find it necessary to do. As posited in a law review article, considering the opportunities that the Supreme Court has had to address the right of implied contribution under Section 10(b) and Rule 10b-5 and its failure to do so, strict statutory construction would appear unlikely. Note, *All Things Being Unequal: Use of the Doctrine of Relative Culpability in Apportioning Contribution. Smith v. Mulvaney*, 827 F.2d 558 (9th Cir. 1987), U. Cin. L.Rev. at 782.

III.

"SETTLEMENT BARS" ARE TYPICAL TO CONTRIBUTION CASES AND SHOULD NOT BE USED AS AN EXCUSE TO DISALLOW CONTRIBUTION

Petitioners' contention that contribution "settlement bars" somehow create a secondary level of jurisprudence that impedes the process of settlement begs the question of the propriety of contribution. While no defendant may wish to settle without the protection of a settlement bar, if contribution were not available, there would be no effective way to see that all culpable parties, whether named as defendants or not, were held responsible for plaintiff's loss.

Moreover, for Petitioners to complain about the problems inherent in the administration of contribution is nothing but a red herring. Contribution is now a well accepted means of apportioning liability among tortfeasors (See, Section I.) and at least thirty-nine states and the District of Columbia now recognize some right of contribution among joint tortfeasors. *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. at 549 citing *Northwest Airlines*, 451 U.S. at 87 n.17.

Recognizing that contribution may in some instances inhibit settlement in complex, multiple defendant actions, several states have enacted statutes which have become generically known as "settlement bar statutes." *Nelson v. Bennett*, 662 F. Supp. at 1328-29. Under the terms of these statutes, a partial settlement will operate to bar non-settling defendants from asserting cross-claims for contribution against settling defendants. The purpose of these

statutes is to encourage settlement and also to complement the equitable goals underlying the right of contribution. *Id.* at 1329.

Thus as settlement bar statutes are a necessary fixture of contribution in state courts, there is no reason to decry their appearance in federal courts.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that a writ of certiorari should not issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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No. 92-34

In The

Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR

Petitioners,

v.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners, Musick, Peeler & Garrett, Leonard Castro, Robert Schuchard, J.H. Cohn & Co., Ed Bacani and Robert Torkar reply to the Opposition to Petition for Writ of Certiorari of Employers Insurance of Wausau ("Wausau") and Federal Insurance Company ("Federal") and respectfully pray that a writ of certiorari issue to review

the decision of the United States Court of Appeals for the Ninth Circuit, dated January 23, 1992.

REPLY

Wausau and Federal introduce a list of decisions of lower federal courts implying a right of contribution in section 10(b) of the Securities Exchange Act and rule 10b-5 of the Securities Exchange Commission. Apparently their argument is that this Court should not review the decision of the Ninth Circuit because other federal courts have made similar decisions for 24 years.

Wausau and Federal ignore two vital points. First, the circuit courts are in explicit conflict regarding whether an implied right of contribution exists, and the conflict makes the law governing multi-million dollar cases depend on venue. Because state boundaries are immaterial to jurisdiction in securities cases, forum shopping is inevitable. Second, this Court has refused to defer to persistent error by lower federal courts in the interpretation of federal securities laws.

In *Lampf, Pleva, Lifkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 115 L.Ed.2d 321, 111 S.Ct. 2773, 59 U.S.L.W. 4688 (June 20, 1991) this Court considered the appropriate statute of limitations to be applied to the fraud victim's implied claim under Section 10(b). In substance, of course, *Lampf, Pleva* dealt with implementation of a claim recognized by this Court, where this case deals with the existence of a claim never recognized by this

Court. From the perspective of whether to grant certiorari, however, *Lampf, Pleva* illustrates why the arguments of Employers and Federal make no sense.

The rule borrowing state law to supply a statute of limitations for a federal claim derived from federal law and a decision of this Court nearly 100 years old. *Id.* at 4689. Lower federal courts applied the state law borrowing rule to claims under Section 10(b) at least as long before *Lampf, Pleva* as 1953. *Fratt v. Robinson*, 203 F.2d 627, 634 (9th Cir. 1953); *see Janigan v. Taylor*, 344 F.2d 781, 783 (9th Cir. 1965), *cert. denied* 382 U.S. 879 (1965). Virtually unanimous authority adopted the state law borrowing rule. *Lampf, Pleva*, footnote 1. Nevertheless, this Court granted certiorari to review an unpublished Ninth Circuit decision which applied the state law borrowing rule when two other circuit courts had created a conflict. *Id.*

The need for certiorari in this case is clearer than the need was in *Lampf, Pleva*. The implied claim for contribution has no grounding in any federal statute, lacks support of any arguably applicable decision of this Court, lacks the longevity of the state law borrowing rule, has less consistent support in the lower courts and is the subject of explicit conflict between Circuits.

In *Lampf, Pleva*, this Court granted certiorari and ultimately decided that federal law, not state law, should be the source of the statute of limitations. In this case, the

Court should grant certiorari and ultimately hold that no claim for contribution can be implied in Section 10(b).

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR,

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION OF NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS ("NASCAT") FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION OF NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS ("NASCAT") TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, the National Association of Securities and Commercial Law Attorneys ("NASCAT") respectfully moves for leave to file the attached brief amicus curiae. Counsel for the Petitioners have consented to the filing of this brief. Counsel for the Respondents have given oral consent to the filing of this brief, and NASCAT expects to file written consent when it is received.

NASCAT is an association of law firms consisting of attorneys located throughout the United States. NASCAT

and its members advocate the enactment and enforcement of effective laws to protect investors from deceptive and manipulative practices and to ensure that the United States' securities markets operate freely and efficiently. NASCAT's members frequently represent plaintiffs in a variety of individual and class action cases prosecuted under the federal securities laws.[1] NASCAT and its members have a strong interest in the effective private enforcement of the federal securities laws and in the development of case law that effectively deters wrongdoers from perpetrating securities fraud upon investors in this country. NASCAT accordingly is *strongly opposed* to the judicial creation of an implied cause of action for contribution to benefit those who commit securities fraud prohibited by section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j), and Rule 10b-5 promulgated thereunder.

Section 10(b) of the Securities Exchange Act of 1934 was designed to deter securities fraud and to make the victims of fraud whole. NASCAT and its members believe the implied cause of action for contribution interferes with these goals in several ways.

First, by spreading the cost of a judgment, an implied cause of action for contribution seriously undermines the deterrent effect of the federal securities laws. "Although courts have uniformly offered deterrence as a rationale for allowing contribution, thoughtful contemporary analysis indicates that a rule denying contribution in rule 10b-5 actions may actually operate as a greater deterrent than a rule permitting contribution." Mark J. Lowenstein, *Implied Contribution Under the Federal Securities Laws: A*

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[1] NASCAT members also have represented defendants in securities litigation and in other complex cases.

Reassessment, 1982 Duke L.J. 543, 573. Indeed, economic analysis "clearly refutes the argument that contribution should be favored because it yields more deterrence than no contribution, for the contrary is true." Frank H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. Law & Econ. 331, 353 (1980). A "rule of no contribution provides greater deterrence" to intentional wrongdoing than can "any rule of contribution."[2]

Second, the judicially created cause of action for contribution discourages settlement of securities fraud actions. A rule of no contribution encourages settlement and promotes equity because "[t]he competition to settle will magnify the relative payment of the more culpable parties."[3] Creation of a wrongdoers' right to contribution actually tends to discourage settlement and to impair their victims' prosecution of lawsuits.

Third, judicial creation of a cause of action to benefit those who commit fraud is unfair to victims of securities fraud. *See* Lowenstein, *supra*, 1982 Duke L. J. at 558. The

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[2] *Id.* at 332. Several judicial decisions acknowledge this point. *See Wilson P. Abraham Constr. Corp. v. Texas Industries, Inc.*, 604 F.2d 897, 903 & n.11 (5th Cir. 1979), *aff'd sub nom. Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (a rule denying contribution "may very well enhance the statutes' deterrent effect by preventing a defendant from cutting its losses"); *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1105-06 (4th Cir. 1989) ("An even greater deterrent effect may exist if a single securities wrongdoer . . . is held liable for the total adverse judgment."); *see also Texas Industries*, 451 U.S. at 636. No decision that adopts contribution to enhance deterrence can claim to be based on sound economic analysis.

[3] Easterbrook, Landes & Posner, *supra*, 23 J. Law & Econ. at 354, 360; *see id.* at 368-70 (demonstrating this).

benefit to wrongdoers is offset by an injury to the victims of fraud in those jurisdictions that, like the Ninth Circuit, hold that the wrongdoers' right to contribution requires courts to reduce trial judgments awarded to victims of securities fraud based on the relative culpability of those who have already settled. *See Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 112 L. Ed. 2d 192 (1990). Ordinarily, plaintiffs who settle with some defendants and proceed to trial against the rest are entitled to recover their full damages subject to an offset of the amount actually received in settlement. Under the *Kaypro* rule, however, victims of securities fraud who settle with some defendants and proceed to trial against the remaining defendants will frequently be prevented from collecting the full amount of their judgment. Under such a regime, the creation of a right to contribution imposes a tremendous penalty on plaintiffs who settle claims with some but not all jointly liable defendants – the defendants' right to contribution destroys the plaintiffs' right to be made whole. This, of course, discourages settlement of securities fraud actions. In addition, by reducing the damages that can be collected in securities fraud cases,[4] the existence of contribution subject to the *Kaypro* rule substantially reduces the aggregate liability of those who commit securities fraud and commensurately reduces the deterrent effect of the federal securities fraud statutes. NASCAT accordingly opposes judicial creation of an implied right to contribution under section 10(b) of the Securities Exchange Act of 1934 because the right to

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[4] *See generally* William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law*, at 203 (1987) (noting that a *Kaypro*-type rule "results in lower recoveries").

contribution interferes with the effective prosecution of securities fraud. But NASCAT also has an interest in seeing the questions surrounding the existence of an implied cause of action for contribution under section 10(b) settled once and for all. As described in the attached brief amicus curiae, the lower courts are in disarray on this question. The controversy over whether defendants have a right to contribution and the resulting controversy over how courts are to give effect to that right of contribution create substantial uncertainties that make the prosecution and settlement of securities fraud actions all the more difficult.

NASCAT accordingly seeks leave to file a brief amicus curiae urging this court to issue a writ of certiorari.

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF NASCAT IN SUPPORT OF PETITIONER FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I. INTRODUCTION

This is an important case that warrants review by this Court to resolve a conflict among the circuits and to bring the law of the Second, Fourth and Ninth Circuits into line with this Court's holdings in two lines of cases. The

Ninth Circuit's holding that there is a right to contribution under section 10(b) of the Securities Exchange Act of 1934 cannot be reconciled with this Court's precedents.

The first line of decisions with which the Ninth Circuit's decision conflicts governs when and how federal courts may create an implied cause of action for contribution to benefit wrongdoers liable under a federal statute that does not expressly provide for contribution. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), hold that a right to contribution may not be created by implication absent legislative intention to create such a cause of action.

A second line of decisions, best represented by *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477-78 (1977), governs when and how federal courts may create implied causes of action under section 10(b) of the Securities Exchange Act of 1934. Although an implied cause of action under section 10(b) has long been recognized under section 10(b)[5] and has been approved by Congress,[6] the scope of such actions is strictly limited to

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[5] *See Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196-97 (1976).

[6] In the recently enacted section 27A, for example, Congress provided for reinstatement of private civil actions under section 10(b) that might otherwise be barred by this Court's holding in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773 (1991). *See* 15 U.S.C. § 78aa-1.

providing relief to victims of fraud and market manipulation. *Santa Fe* holds that additional causes of action may not be created under section 10(b) merely to further important policy objectives or to serve what is at best a subsidiary purpose of Congress in providing a remedy to victims of fraud. *Santa Fe* accordingly prohibits judicial creation of an implied cause of action to benefit those who commit securities fraud and are liable under section 10(b).

In addition to conflicting with precedents of this Court, the decision below also conflicts directly with decisions in the Seventh and Eighth Circuits which, unlike the Ninth Circuit, faithfully follow this Court's precedents in *Northwest Airlines* and *Texas Industries*. At present, the lower courts are in complete disarray, with most decisions recognizing a right to contribution that the Seventh and Eighth Circuits prohibit. Only review by this Court can restore consistency and order to the federal decisional law governing contribution under section 10(b).

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS AND OFFERS IT AN OPPORTUNITY TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS

The decision below is appropriate for review because it cannot be reconciled with binding precedents of this Court. In addition, it offers this Court the opportunity to resolve a very important conflict among the Circuits.

A. The Ninth Circuit's Holding In This And Other Decisions, That There Is An Implied Cause Of Action For Contribution Under Section 10(b), Conflicts With The Rationale Of This Court's Decisions In *Northwest Airlines* And *Texas Industries*

In *Northwest Airlines* and *Texas Industries* this Court held that the federal judiciary may not imply a right to contribution in federal statutes if Congress did not intend to provide for one. Although this Court did not consider whether an implied cause of action for contribution could be created under the federal securities laws in order to benefit those who commit fraud, the principles set forth in *Northwest Airlines* and *Texas Industries* properly control the question. Several courts have so held. *See infra*. Nonetheless, the Second, Fourth and Ninth Circuits insist on continuing to recognize a judicially created right to contribution under section 10(b) of the Securities Exchange Act of 1934, placing them in direct conflict with precedents from the Seventh and Eighth Circuits.

In *Northwest Airlines*, this Court held that that contribution is not available under either the Equal Pay Act of 1983 or Title VII of the Civil Rights Act of 1964. The Court observed that a cause of action for contribution might be implied "if, among other things, the language of the statutes indicates that they were enacted for the special benefit of a class of which the [party seeking contribution] is a member." 451 U.S. at 91-92. The Court held that no right to contribution could be implied because "it cannot possibly be said that employers are members of the class for whose especial benefit either the Equal Pay Act or Title VII was enacted." *Id.* at 92 (citation omitted).

> To the contrary, both statutes are expressly directed against employers; Congress intended in these statutes to regulate their conduct for the benefit of employees. In light of this fact, [an employer liable under these statutes] "can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection.' "

Id. (quoting *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 37 (1977)) (footnote omitted). No principles of federal common law permit a court to fashion a cause of action for contribution under a statute where Congress did not intend to provide one. *Id.* at 95-98.

The *Northwest Airlines* opinion left open the question of whether contribution may be implied under the antitrust acts because, "[i]n antitrust, the federal courts enjoy more flexibility and act more as common-law courts than in other areas governed by federal statute." *Id.* at 98 n.42. Five weeks later, in *Texas Industries*, this Court applied *Northwest Airlines* to hold that no implied cause of action for contribution may be created under either the Sherman or the Clayton antitrust acts because those acts "were not adopted for the benefit of the participants in a conspiracy to restrain trade." 451 U.S. at 639. The Court observed that "the Sherman Act and the provision for treble-damages actions under the Clayton Act were not adopted for the benefit of the participants in a conspiracy to restrain trade." *Id.* "On the contrary," the Court found, one who conspires to restrain trade " 'is a member of the class whose activities Congress intended to regulate for the protection and benefit *of an entirely distinct class*' " – the victims of such practices. *Id.* (quoting *Piper*, 430 U.S. at

37) (emphasis in original). Once again, nothing in principles of federal common law could justify creation of an implied cause of action for contribution under a statute when Congress itself did not intend to create one. *Id.* at 640-46.

Several district court decisions suggest that a right to contribution under section 10(b) may be judicially created because the United States Supreme Court expressly reserved the question in both *Northwest Airlines* and *Texas Industries*.[7] *Northwest Airlines* reserved the question of whether contribution might be implied under the antitrust laws, 451 U.S. at 98 n.42, and *Texas Industries* reserved the question of whether contribution might be implied in the federal securities laws,[8] but the principles laid down in those cases govern the judicial creation of contribution rights in any statutory scheme.

The rationale of *Northwest Airlines* and *Texas Industries prohibits* implication of a right to contribution under

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[7] *See, e.g., Baker v. BP America, Inc.*, 749 F. Supp. 840, 844 (N.D. Ohio 1990); *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880, 885 (D.N.J. 1984); *In re National Student Marketing Litigation*, 517 F. Supp. 1345, 1349 (D.D.C. 1981).

[8] In *Texas Industries* the Court observed that decisions such as *Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979), have held that under the federal securities laws "when an implied right of action exists under the securities laws, there also is an implied right to contribution." *Texas Industries*, 451 U.S. at 640 n.11. The Court "intimate[d] no view as to the correctness of these decisions" because contribution under the federal securities laws was not before it – just as contribution under the antitrust laws had not been raised in *Northwest Airlines*. *Id.*

section 10(b) if it was not designed to benefit those who commit securities fraud. In fact, section 10(b) was no more designed to protect those who defraud investors than were the Equal Pay Act and Title VII designed to protect employers, *see Northwest Airlines*, 451 U.S. at 92, or the antitrust laws to benefit those who conspire in restraint of trade. *See Texas Industries*, 451 U.S. at 639. Section 10(b) is a part of the Securities Exchange Act of 1934 which "was designed to protect investors against manipulation of stock prices"[9] by "implementing a 'philosophy of full disclosure.' "[10] *By its own terms* section 10(b) authorizes promulgation of rules and regulations that are "in the public interest *or for the protection of investors*." 15 U.S.C. § 78j(b) (emphasis added). It is *not* for the protection of those who perpetrate fraud. Under *Northwest Airlines* and *Texas Industries*, no cause of action for contribution may be implied under section 10(b).

B. The Ninth Circuit's Holding In This And Other Decisions, That There Is An Implied Cause Of Action For Contribution Under Section 10(b), Conflicts With This Court's Decisions In *Santa Fe Industries*

A handful of district court decisions seek to avoid *Northwest Airlines* and *Texas Industries* by holding that because the private cause of action under section 10(b) itself arises from implication, courts can do as they wish

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[9] *Basic Inc.*, 485 U.S. at 230.

[10] *Santa Fe Industries*, 430 U.S. at 477-78.

under the statute and create new implied causes of action as they choose.[11] The Eighth Circuit rejected such contentions in *Chutich*:

> Because federal courts implied the private right of action for substantive violations of section 10(b) and Rule 10b-5, federal courts have discretion to award appropriate relief to plaintiffs pursuing that right of action. It does not follow, however, that federal courts have common law power to create a new right of action for contribution accruing to defendants.

Chutich v. Touche Ross & Co., 960 F.2d 721, 724 (8th Cir. 1992).

Indeed, the argument itself disregards this Court's holding in *Santa Fe Industries*, 430 U.S. at 477-78, that the implied cause of action arising under section 10(b) *may not* be extended to actions that serve a subsidiary purpose of the statute and are not necessary to the fundamental protection of investors: "Although we have recognized an implied cause of action under [section 10(b)] in some circumstances, we have also recognized that *a private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is 'unnecessary to ensure the fulfillment of Congress' purposes in adopting the Act.*" *Id.* at 477 (citations omitted, emphasis added).

An implied cause of action to benefit those who commit fraud is hardly necessary to achieve – and in fact

[11] *See Baker*, 749 F. Supp. at 842-44; *In re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. 597, 615-16 (N.D. Ill. 1987).

is contrary to – Congress' fundamental purpose in adopting section 10(b), *see id.*, and federal courts are *not* authorized under section 10(b) to create private causes of action "to serve what is 'at best a subsidiary purpose' of the federal legislation."[12]

The *Northwest Airlines/Texas Industries* line of cases on when courts may create an implied cause of action to benefit wrongdoers, and the *Santa Fe Industries* line of cases limiting the creation of implied cause of action under section 10(b), converge to demand a single result: *federal courts may not create an implied cause of action for contribution to benefit those who commit securities fraud prohibited by section 10(b).*

C. Decisions From The Seventh And Eighth Circuits Hold That Under *Northwest Airlines* And *Texas Industries*, Federal Courts Are Not Free To Create An Implied Cause Under Section 10(b) Of Action For Contribution To Benefit Those Who Commit Fraud

Although several courts created an implied cause of action for contribution under section 10(b) and other provisions of the federal securities laws before *Northwest Airlines* and *Texas Industries* were decided, recent decisions in the Seventh and Eighth Circuits have held that this Court's decisions in *Texas Industries* and *Northwest Airlines* require a different result. The decisions from the Seventh and Eighth Circuits are in direct conflict with

[12] *Id.* at 478; *compare Piper*, 430 U.S. at 41-46 (limiting relief available for violations of section 14(e) of the Securities Exchange Act of 1934 and Rule 10b-6 promulgated pursuant to section 10(b)).

decisions of the Second, Fourth and Ninth Circuits which continue to recognize and impose a judicially created cause of action for contribution under section 10(b).

In *Heizer Corp. v. Ross*, 601 F.2d 330, 331-34 (7th Cir. 1979), the Seventh Circuit created an implied right to contribution under section 10(b) of the Securities Exchange Act of 1934. *Heizer* was one of the leading decisions establishing an implied right to contribution under section 10(b) before *Northwest Airlines* and *Texas Industries* were decided.[13]

"Significantly, after *Texas Industries*, the Seventh Circuit disavowed its analysis in the earlier leading case, *Heizer*, which held there is an implied right of action for contribution under section 10(b) and Rule 10b-5." *Chutich v. Touche Ross*, 960 F.2d at 723 (citation omitted). Indeed, the Seventh Circuit expressly repudiated *Heizer's* reasoning in *King v. Gibbs*, 876 F.2d 1275 (7th Cir. 1989), which applied *Northwest Airlines* and *Texas Industries* to reject contentions that a right to indemnification may be implied under section 10(b) of the Securities Exchange Act of 1934. "*King* annulled the reasoning in *Heizer*," *Robin v. Doctors Officenters Corp.*, 730 F. Supp. 122, 124 (N.D. Ill. 1989), and *Heizer* has been effectively overruled so that "[n]o private cause of action for contribution may be implied under Rule 10b-5" in the Seventh Circuit. *Id.* at

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[13] The *Heizer* decision was cited by this Court in *Texas Industries* as one of the leading decisions creating an implied cause of action for contribution under section 10(b), *Texas Industries*, 451 U.S. at 640 n.11, and after *Texas Industries* was decided, *Heizer* provided a foundation for the Ninth Circuit law recognizing the judicially created right to contribution. *See infra*.

125 (footnote omitted). Binding principles set forth by this Court in *Northwest Airlines* and *Texas Industries* required this result. *Id.*

District courts in the Fourth[14] and Eighth[15] Circuits also recognized that under *Northwest Airlines* and *Texas Industries*, no implied right to contribution may be created to benefit those who violate federal securities statutes.

This year the Eighth Circuit itself joined these courts to hold that under *Northwest Airlines* and *Texas Industries*, "federal courts are powerless to create a right of action for contribution among violators of section 10(b) and Rule 10b-5 without a statutory or federal common law basis," *Chutich v. Touche Ross*, 960 F.2d at 723 (citations omitted), and that *no such basis exists*. *Id.* at 724. According to the Eighth Circuit, under *Northwest Airlines* and

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[14] *First Financial Savings Bank, Inc. v. American Bankers Insurance Co.*, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,827, at 94,453-54 (E.D.N.C. 1989), *overruled sub silentio, In re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991), *as held in later opinion, First Financial Savings Bank, Inc. v. American Bankers Insurance Co.*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,071, at 90,401-02 (E.D.N.C. 1991).

[15] *See, e.g., Chutich v. Green Tree Acceptance, Inc.*, 759 F. Supp. 1403, 1408 (D. Minn. 1991), *aff'd sub nom. Chutich v. Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992); *Biben v. Card*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,512, at 92,331 n.2 (W.D. Mo. 1991); *Nelson v. Craig-Hallum, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,500, at 93,192-93 (D. Minn. 1989); *In re Professional Financial Management, Ltd.*, 683 F. Supp. 1283, 1285-87 (D. Minn. 1988).

Texas Industries, "federal courts have no common law power to create a right of action for contribution among violators of section 10(b) and Rule 10b-5." *Id.*

D. Decision Of Second, Fourth And Ninth Circuits Continue To Recognize A Judicially Created Right To Contribution Under Section 10(b), In Complete Disregard Of Controlling Law

The significance of *Northwest Airlines* and *Texas Industries* is clear. *See Chutich v. Touche Ross*, 960 F.2d at 723-24. No right to contribution may be created under section 10(b) unless it is clear that Congress intended to create one – and Congress clearly *did not*. *Id.* Nonetheless the Second Circuit,[16] Fourth Circuit[17] and Ninth Circuit[18] have continued to hold that federal courts may create such an implied cause of action for contribution under section 10(b) of the Securities Exchange Act of 1934. So

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[16] *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 578 (2d Cir.), *cert. denied*, 459 U.S. 838 (1982).

[17] *In re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991).

[18] *Employers Insurance of Wausau v. Musick, Peeler & Garrett*, 954 F.2d 575, 577-78 (9th Cir. 1992), Petition App. at 6; *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1228 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 232 (1990); *Smith v. Mulvaney*, 827 F.2d 558, 560 (9th Cir. 1987).

have district courts in the in the First,[19] Second,[20] Third,[21] Fourth,[22] Sixth,[23] Tenth[24] and District of Columbia[25] Circuits.

These decisions fail to take adequate account of this Court's precedents. The Ninth Circuit first created an implied right to contribution under section 10(b) in *Smith v. Mulvaney*, 827 F.2d 558, decided six years after *Northwest Airlines* and *Texas Industries*. The court devoted a total of two sentences to analysis of this important issue:

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[19] *MFS Municipal Income Trust v. American Medical International, Inc.*, 751 F. Supp. 279, 281 (D. Mass. 1990); *In re Atlantic Financial Management, Inc. Securities Litigation*, 718 F. Supp. 1012, 1015 (D. Mass. 1988); *Kennedy v. Josephthal & Co.*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,204, at 95,821 (D. Mass. 1983). *But see In re Atlantic Financial Management, Inc. Securities Litigation*, 603 F. Supp. 135, 137-38 (D. Mass. 1985).

[20] *Pepsico, Inc. v. Continental Casualty Co.*, 640 F. Supp. 656, 662 (S.D.N.Y. 1986); *Noonan v. Granville-Smith*, 532 F. Supp. 1007, 1008 (S.D.N.Y. 1982).

[21] *See, e.g., Wilder v. Williams*, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,776, at 94,183 (W.D. Pa. 1989); *Seiler*, 102 F.R.D. at 885-86.

[22] *See, e.g., United States Fidelity & Guaranty Co v. Patriot's Point Development Authority*, 772 F. Supp. 1565, 1569 (D.S.C. 1991).

[23] *See, e.g., Baker*, 749 F. Supp. at 842-44; *Alexander Grant & Co. v. McAlister*, 669 F. Supp. 163, 165-66 (S.D. Ohio 1987).

[24] *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 550 (D. Colo. 1989), *appeal dismissed without opinion*, 936 F.2d 582 (10th Cir. 1991).

[25] *In re National Student Marketing*, 517 F. Supp. at 1348-49.

> We hold that an implied right of contribution exists under Section 10(b) and Rule 10b-5. This is in accord with the other circuits that have decided this issue.

Id. at 560. The Ninth Circuit neither considered nor cited this Court's controlling decisions on when contribution may be implied. Instead, it relied on decisions such as *Heizer* which had *preceded* this Court's holdings in *Northwest Airlines* and *Texas Industries*.

While subsequent decisions of the Ninth Circuit on contribution under section 10(b) have cited and discussed *Northwest Airlines* and *Texas Industries*, they have *never* engaged in the analysis required by those decisions – which would compel the Court to join the Seventh and Eighth Circuits in rejecting implied causes of action for contribution under the securities statutes. The Ninth Circuit has adhered to earlier holdings that an implied right to contribution exists under section 10(b).

In *Franklin v. Kaypro*, 884 F.2d at 1228, the court cited *Northwest Airlines* for the proposition that "[n]ot all forums have laws governing contribution." *Id.* at 1228. Yet the Ninth Circuit failed to consider whether *Northwest Airlines'* holding permits judicial creation of a right to contribution under section 10(b). Instead, it followed the Seventh Circuit's decision in *Heizer* which had already been repudiated in the Seventh Circuit, *see supra*, citing *Heizer* to hold "it has been determined that a right to contribution exists under claims based on section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission's Rules, 17 C.F.R. § 240.10b-5." *Id.* at 1226. The Seventh Circuit's decision in *Heizer* was deemed to have more controlling authority

than this Court's subsequent decisions in *Northwest Airlines* and *Texas Industries*!

In this case the Ninth Circuit has chosen, once again, to ignore *Northwest Airlines* and *Texas Industries* and to follow the holdings of *Smith* and *Franklin v. Kaypro*, that a right to contribution may be created under section 10(b). The court cited *Northwest Airlines* for the proposition that "[t]he law of contribution is intricate,"[26] but it again failed to follow the holdings of this Court, that a right to contribution *may not be implied* in a statute in the absence of a legislative intent to create one. It held simply:

> No explicit right to contribution is provided for in section 10(b) of the Securities Exchange Act of 1934 or Rule 10b-5. We have recognized, however, that these provisions imply a right of contribution.

Id. at 577, Petition App. at 4.

The development of the law of contribution in the Fourth Circuit similarly illustrates the absolute incoherence of decisional law creating a cause of action for contribution under the federal securities statutes. In *Wassel v. Eglowsky*, 542 F.2d 1235 (4th Cir. 1976), *overruled by Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989), the Fourth Circuit created an implied cause of action for contribution under section 12(2) of the Securities Act of 1933. In *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1104-06 (4th Cir. 1989), the Fourth Circuit held that *Texas Industries* and *Northwest*

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[26] *Employers Insurance*, 954 F.2d at 578, Petition App. at 6.

Airlines effectively overruled its holding in *Wassel* and that under this Court's precedents no implied right of contribution may be created on behalf of those who commit securities fraud.

The Fourth Circuit rejected an implied right to contribution under the Securities Act of 1933, reasoning that "the statute's protection extends to investors who purchase securities based on misleading statements of material fact; it is not solicitous of unsuccessful defendants in a federal securities action." *Baker*, 876 F.2d at 1105. The "legislative history and structure of the federal securities laws do not suggest the recognition of implied rights of contribution. . . . " *Id.* In *First Financial*, ¶ 94,827, at 94,453-54, a Fourth Circuit district court accordingly held that under *Texas Industries* and *Northwest Airlines*, no right to contribution may be implied under section 10(b).

Then, in 1991, without any analysis of any kind – and without citing either *Northwest Airlines* or *Texas Industries* – the Fourth Circuit held that "it is well established that there is a right to contribution for parties jointly liable for violating Section 10(b) and Rule 10(b)-5." *In re Jiffy Lube*, 927 F.2d at 160 (citation omitted). Fourth Circuit district courts were required to reverse themselves, ignoring *Northwest Airlines* and *Texas Industries*, and to follow *In re Jiffy Lube*. *See, e.g., First Financial*, ¶ 96,071, at 90,401-02; *United States Fidelity*, 772 F. Supp. at 1569.

The Second Circuit's holding that there is a right to contribution under section 10(b) is similarly devoid of the analysis mandated by *Northwest Airlines* and *Texas Industries, see Sirota*, 673 F.2d at 578, but district courts in this

most influential Circuit are bound to follow it. *See, e.g., Pepsico*, 640 F. Supp. at 662; *Noonan*, 532 F. Supp. at 1008.

The Second, Fourth and Ninth Circuits thus are in irreconcilable conflict with the decisions of the Seventh and Eighth Circuits. It is a conflict that only review by this Court can resolve.

III. CONCLUSION

Courts in the Seventh and Eighth Circuits follow this Court's decisions and hold that no implied cause of action for contribution may be created to benefit those who commit fraud under section 10(b). Courts in the First, Second, Third, Fourth, Sixth, Tenth and District of Columbia Circuits hold to the contrary, imposing an implied cause of action for contribution under section 10(b) even after *Northwest Airlines* and *Texas Industries*. The lower courts are in disarray and only intervention by the Supreme Court can restore order to the precedents. This is an appropriate case for review by the Supreme Court.

Review by this court has been deemed appropriate where the decision below "appeared to be in conflict with our precedents." *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982). The Ninth Circuit's decisions conflict with this Court's reasoning in *Northwest Airlines* and *Texas Industries* which control how and when the courts may create an implied cause of action for contribution.

Review by this court is appropriate "to forestall a possible conflict in the lower courts" on an important

issue, even if there is "no direct conflict" among the several district court and court of appeals decisions on the question. *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 185 & n.4 (1980). It is appropriate where the district courts have fallen into conflict. *See, e.g., Curtis v. Loether*, 415 U.S. 189, 191 n.2 (1974). It is all the more appropriate here, where the decision below is in conflict with the decisions of this Court, the lower courts are in disarray, and the circuits are in direct and irreconcilable conflict. *See Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, 377 U.S. 235, 237 (1964); *Commissioner v. Bider*, 369 U.S. 499, 501 (1962); Supreme Court Rule 10.1(a).

Review is particularly important in a case like this which involves important questions of law and the appropriate conduct of the courts in our system of constitutional federalism – and which affects literally hundreds of complex securities fraud actions brought to vindicate the interests of victims of fraud and manipulation.

The problem is not one that will correct itself if left to the lower courts which are in disarray. There is no likelihood that the Ninth Circuit will change its position of its own accord. The Court has *refused to hear* petitions for en banc rehearing in *both Employers Insurance* and *Franklin v. Kaypro*. Absent such en banc proceedings – or an *intervening* decision of this Court – panels of the Ninth Circuit are without power to depart from erroneous holdings of prior panels.[27] As erroneous as it may be, the right to contribution has become a firm fixture in the law of the circuit.

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[27] *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1285 (9th Cir. 1992); *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702, 707

(Continued on following page)

Public policy considerations also strongly support issuance of a writ of certiorari as to correct the decision below and to bring order to the circuits. Creation of a judicially implied cause of action for contribution is contrary to public policy because it reduces deterrence,[28] discourages settlement[29] and, in the Ninth Circuit, prevents victims of fraud from being made whole, and because it greatly increases the expense and burden of litigation – both for litigants and for the courts. *See* Motion For Leave To File Brief Amicus Curiae, *supra*.

(Continued from previous page)

n.3 (9th Cir. 1989); *United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1986) (Kennedy, J.); *Christoffel v. E.F. Hutton & Co.*, 588 F.2d 665, 667 (9th Cir. 1978), *overruled on other grounds by Hollinger v. Titan Capital*, 914 F.2d 1564 (9th Cir. 1990) (en banc).

[28] Mark J. Loewenstein, *Implied Contribution Under the Federal Securities Laws: A Reassessment*, 1982 Duke L. J. 543, 573; Frank H. Easterbrook, William M. Landes, & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. Law & Econ. 331, 332, 353 (1980).

[29] *See* Easterbrook, Landes & Posner, *supra* 23 J. Law & Econ. at 354, 360, 368-70.

NASCAT respectfully submits that the petition for certiorari should be granted.

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No. 92-34

In The

Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR,

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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NOTATION REGARDING LOCATION OF ITEMS NOT PART OF APPENDIX

The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for a Writ of Certiorari:

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TABLE OF SIGNIFICANT DOCKET ENTRIES

DATE	COURT	ITEM
May 9, 1989	District	Filed: Complaint for Damages
July 18, 1989	District	Filed: First Amended Complaint for Damages
January 11, 1990	District	Filed: Notice of Motion and Motion to Dismiss First Amended Complaint by Defendant Musick, Peeler & Garrett, Castro and Schuchard
January 22, 1990	District	Filed: Defendants' Notice of Motion and Motion to Dismiss First Amended Complaint
April 2, 1990	District	Heard: Defendants' Motions to Dismiss First Amended Complaint
April 10, 1990	District	Filed: Memorandum Decision and Order
April 12, 1990	District	Entered: Judgment
May 7, 1990	District	Filed: Plaintiffs' Notice of Appeal
June 25, 1990	Appeals	Docketed: Plaintiffs' Appeal
June ~~6~~, 1991	Appeals	Heard: Plaintiffs' Appeal
January 23, 1992	Appeals	Filed: Opinion
February 6, 1992	Appeals	Filed: Petition for Rehearing And Suggestion of Rehearing *en banc*

April 21, 1992	Appeals	Filed: Supplement to Suggestion for Rehearing *en banc*
May 28, 1992	Appeals	Filed: Order (Denying Petition for Rehearing and Rejecting Suggestion for Rehearing *en banc*)
July 2, 1992	Supreme	Filed: Petition for a Writ of Certiorari
October 5, 1992	Supreme	Filed: Order (Granting Petition for Certiorari)

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Plaintiffs,

v.

MUSICK, PEELER & GARRETT, a Partnership; LEONARD CASTRO, an Individual; ROBERT SCHUCHARD, an Individual; K.M.G. MAIN HURDMAN, a partnership; PEAT, MARWICK, MAIN & CO., a Partnership; J.H. COHN & CO., a Partnership; ED BACANI, an Individual; ROBERT TORKAR, an Individual; DOES 1 through 100; and ROES 1 through 300, Inclusive,

Defendants.

) Case No. 890705 JLI(BTM)

FIRST AMENDED COMPLAINT FOR DAMAGES: (1) CONTRIBUTION; (2) EQUITABLE INDEMNITY

DEMAND FOR JURY TRIAL

Plaintiffs, EMPLOYERS INSURANCE OF WAUSAU ("WAUSAU") and FEDERAL INSURANCE COMPANY ("FEDERAL") (WAUSAU and FEDERAL are herein after referred to collectively as "Plaintiffs") complain against Defendants and allege as follows:

INTRODUCTION

1. This is a civil action for recovery of damages caused by the wrongful conduct of certain attorneys and accountants as set forth below. This lawsuit arises from a class action securities litigation in which insureds of WAUSAU and FEDERAL were named as defendants, which was settled for $13,500,000, $13,000,000 of which was paid by WAUSAU and FEDERAL as subrogees of their insureds. By this Complaint Plaintiffs seek damages as contribution and/or equitable indemnity the from attorneys and accountants whose recklessness, gross negligence and negligence contributed to produce the injuries to the plaintiff class in the securities litigation and who are liable to those plaintiffs for the same harm for which the named defendants in that case were liable.

JURISDICTION

2. This Court has jurisdiction over claims for relief alleged herein under 28 U.S.C. § 1331, in that Plaintiffs' right to relief with respect to certain of its claims for contribution based on Defendants' alleged violations of federal securities laws arise under federal law, and because certain of their claims for indemnity based on state law necessarily depend on resolution of substantial questions of federal law under the Securities Exchange of

1934, 15 U.S.C. §§ 78(a) *et seq.* (the "Exchange Act") and the Securities Act of 1933, 15 U.S.C. §§ 77(a) *et seq.* (the "Securities Act"). This Court has pendent jurisdiction over the claims that arise under state law because the state law claims arise from a common nucleus of operative facts, and are so intertwined with the other matters pending before this Court as to make the exercise of jurisdiction appropriate.

VENUE

3. Venue of this action is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) in that the claim arose within this judicial district.

PARTIES AND PARTICIPANTS

(Plaintiffs)

4. Plaintiff WAUSAU is a mutual insurance company duly organized and existing under the laws of the State of Wisconsin, with its principal place of business in Wausau, Wisconsin. WAUSAU is authorized to transact and transacts insurance business in the State of California and transacts business within the venue of this Court. WAUSAU issued and became obligated by the terms of a Securities Act Liability Policy, No. 5736-00-200577 ("WAUSAU Policy"), to, among other matters, hold the insureds thereunder harmless, within the limits therein stated, from and against such loss, liability, cost or expense as the insureds may incur, sustain or discover that they have incurred or sustained by reason of any claim or claims which may be made against the insureds

in respect of any transaction entered into during the period from October 11, 1983, to December 11, 1986, under any provision of the Securities Act, or the Exchange Act, or the common or statutory law of the United States of America or of any state or other jurisdictions with respect to:

(a) the purchase by the underwriters, the public offering or any purchases or any sales made by or to any person of all or any of the securities of COUSINS HOME FURNISHINGS, INC. ("COUSINS"), registered with the United States Securities and Exchange Commission; or

(b) any purchase or sale of securities of COUSINS by the insureds specified in the policy in connection with transactions entered into to facilitate the public offering of COUSINS securities.

The insureds under the WAUSAU policy included COUSINS its directors and officers, COUSINS employees who signed its registration statement in connection with the public offering of securities which became effective December 7, 1983, the co-lead underwriters for the offering (Montgomery Securities and Wheat, First Securities), and others specified in the policy.

5. Plaintiff FEDERAL is a stock insurance company duly organized and existing under the laws of the State of New Jersey, with its principal place of business in the State of New Jersey. FEDERAL is authorized to transact and transacts insurance business in the State of California and transacts business within the venue of this Court. FEDERAL issued and became obligated by the terms of an Executive Liability and Indemnification Policy, No. 80956982, ("FEDERAL Policy"), to, among other matters:

(a) pay on behalf of each of the insured persons (insured persons is defined as any person who was prior to or at the date of the FEDERAL Policy, or became during the policy a duly elected director or a duly elected or appointed officer of COUSINS and its subsidiaries) for a loss which such insured person is not indemnified for by COUSINS and/or its subsidiaries and which such insured person becomes legally obligated to pay on account of any claims made against him, individually or otherwise, during or after the policy period (December 7, 1983, to December 7, 1986) for a wrongful act; and

(b) to pay on behalf of COUSINS and its subsidiaries all loss for which they grant indemnification to each insured person, as permitted or required by law, which such insured person has become legally obligated to pay on account of any claim(s) made against him, individually or otherwise, during or after the policy period, for a wrongful act.

6. Plaintiffs, as subrogees of their insureds, which insureds were defendants in the underlying securities litigation, have standing to bring this Complaint for complete and/or partial contribution and/or equitable indemnity from the Defendants sued herein who are liable for wrongful conduct which caused harm and damage to the plaintiff class in the underlying securities litigation consisting of all persons who purchased COUSINS common stock between December 7, 1983, through July 18, 1984.

(Defendants)

7. Defendant MUSICK, PEELER & GARRETT ("MUSICK") is a partnership organized under the laws of the State of California, with its principal place of business in the City of Los Angeles. At all times material hereto, MUSICK served as principal legal counsel for COUSINS in connection with, among other matters, its December 7, 1983, initial public offering of common stock. At all times relevant hereto, defendant MUSICK committed the wrongful acts and omissions set forth below in the ordinary course of its business, and aided and abetted others in committing wrongful acts and omissions complained of herein, in part to obtain the substantial fees it received from COUSINS.

8. Defendant LEONARD CASTRO ("CASTRO") is an individual and a resident of the State of California who, as an attorney licensed under the laws of the State of California, acted at all times pertinent hereto as the partner in the MUSICK law firm principally responsible for the conduct and handling of COUSINS' legal affairs. He substantially participated in the preparation and filing of the COUSINS' Registration Statement and COUSINS' Prospectus and in various legal matters relating thereto. At all times pertinent hereto, Defendant CASTRO committed the wrongful acts and omissions set forth below in the ordinary course of business of the MUSICK partnership or with the authority of his co-partners.

9. Defendant ROBERT SCHUCHARD ("SCHUCHARD") is an individual and a resident of the State of California who, as an attorney licensed under the laws of the State of California, acted at all times pertinent hereto

as an associate lawyer employed by MUSICK, who participated substantially in the furnishing of services to COUSINS by that firm in connection with activities which are the subject of this Complaint. At all times pertinent hereto, Defendant SCHUCHARD committed the wrongful acts and omissions set forth below in the ordinary course of business of the MUSICK partnership in his capacity as a MUSICK employee acting within the scope of business of the MUSICK partnership.

10. Plaintiffs are informed and believe and thereon allege that at the time of the wrongful acts alleged hereafter, K.M.G. MAIN, HURDMAN ("MAIN"), was a partnership of certified public accountants organized under the laws of the State of California and transacting business within the venue of this Court. At all times material hereto, Defendant MAIN was engaged by COUSINS to provide independent auditing, accounting and advisory services, for which MAIN received substantial fees. In performing these services for COUSINS, MAIN's personnel were frequently present at COUSINS' headquarters and had continual access to and knowledge of COUSINS' private and confidential business and financial information, and thus knew or recklessly disregarded the true facts as hereinafter alleged regarding the time financial condition and business problems of COUSINS which were concealed from the investing public. MAIN audited COUSINS' financial statements for the period ended June 30, 1983, in connection with the December 1983 public offering and reported in an unqualified opinion that the financial statements at and for the period ended June 30, 1983, fairly presented COUSINS' financial position and results of operations in accordance with Generally

Accepted Accounting Principles ("GAAP") and had been examined in accordance with Generally Accepted Accounting Standards ("GAAS"). Plaintiffs are informed and believe and thereon allege that MAIN, assisted by COHN, prepared for inclusion in documents filed by COUSINS in connection with the December 1983 public offering, restated financial information and financial information covering the period July 1, 1983 through September 30, 1983. Furthermore, MAIN reviewed COUSINS' financial matters and other events subsequent to the June 1983 financials as part of its S-1 review. At all times pertinent hereto, Defendant MAIN committed the wrongful acts and omissions set forth below in the ordinary course and conduct of its business and aided and abetted others in committing wrongful acts and omissions complained of herein in part to obtain the substantial fees it received from COUSINS.

11. PEAT, MARWICK, MAIN & CO. ("PEAT, MARWICK") is a partnership of certified public accountants organized under the laws of the State of California, with its principal place of business in San Francisco, California. PEAT, MARWICK transacts business within the venue of this Court. Plaintiffs are informed and believe and thereon allege that PEAT, MARWICK is the successor of MAIN, and on that basis, is responsible for the wrongful acts and omissions by MAIN as set forth below.

12. Defendant J.H. COHN & CO. ("COHN") is a partnership of certified public accountants organized under the laws of the State of California, with its principal place of business in the City of San Diego and transacts business within the venue of this Court. At all times material hereto, Defendant COHN was engaged by

COUSINS predecessor, S.A. Levitz, Inc. ("SAL"), and thereafter by COUSINS, to provide independent auditing, accounting and advisory services, for which COHN received substantial fees. In connection with the services it rendered to SAL and to COUSINS, COHN's personnel was present at SAL' s and COUSINS' corporate headquarters frequently and had continual access to and knowledge of their private and confidential business and financial information, and thus knew or recklessly disregarded the true facts as hereinafter alleged concerning the actual financial condition and business problems of COUSINS which were concealed from the investing public. COHN audited SAL's and COUSINS' financial statements for the periods ended June 30, 1979, 1980, 1981 and 1982, and in connection with COUSINS' December 1983 public offering, reported unqualified opinions that the June 30, 1981 and 1982 financial statements fairly presented COUSINS' financial position and results of operations in accordance GAAP and had been examined in accordance with GAAS. Plaintiffs are informed and believe and thereon allege that COHN prepared for inclusion in documents filed by COUSINS in connection with the December 1983 public offering restated financial statements for the periods ended June 30, 1979 and 1980. Plaintiffs are informed and believe and thereon allege that COHN and MAIN prepared for inclusion in the COUSINS Prospectus financial information covering the period July 1, 1983 through September 30, 1983. At all times pertinent hereto, defendant COHN committed the wrongful acts and omissions set forth below in the ordinary course and conduct of its business and aided and

abetted others in committing wrongful acts and omissions complained of herein in part to obtain the substantial fees it received from COUSINS.

13. Plaintiffs are informed and believe and thereon allege that Defendant ED BACANI ("BACANI"), an individual, is a resident of the State of California who, as a certified public accountant licensed under the laws of the State of California, acted at all times pertinent hereto as the partner in the COHN accounting firm, principally responsible for the conduct and handling of much of COUSINS accounting affairs. He substantially participated in the preparation of financial information contained in the COUSINS Registration Statement and COUSINS Prospectus, and regarding various accounting matters relating thereto. At all times pertinent hereto, defendant BACANI committed the wrongful acts and omissions set forth below in the ordinary course of the business of the COHN partnership or with the authority of his co-partners.

14. Plaintiffs are informed and believe and thereon allege that Defendant ROBERT TORKAR ("TORKAR"), an individual, is a resident of the State of California who, as a certified public accountant licensed under the laws of the State of California, acted at all times pertinent hereto as a senior associate employed by COHN, who participated substantially in the furnishing of services to COUSINS by that firm in connection with activities which are the subject of this Complaint. At all times pertinent hereto, defendant TORKAR committed the wrongful acts and omissions set forth below in the ordinary course of the business of the COHN partnership or as a COHN

employee acting within the scope of the business of the COHN partnership.

15. Defendants DOES 1 through 100, inclusive, are natural persons sued herein under fictitious names for the reason that Plaintiffs are unaware of their true names and capacities; at such time as said true names and capacities are ascertained, Plaintiffs will seek leave to amend this Complaint to substitute such true names for such fictitious names. Each of said Defendants is liable in some manner for the damages sued upon herein.

16. Plaintiffs are informed and believe, and thereon allege that MUSICK, CASTRO and SCHUCHARD and each Doe Defendant is the agent of and liable for the acts and omissions of the others.

17. Defendants ROES 1 through 100, inclusive, are natural persons sued herein under fictitious names for the reason that Plaintiffs are unaware of their true names and capacities; at such time as said true names and capacities are ascertained, Plaintiffs will seek leave to amend this Complaint to substitute such true names for such fictitious names. Each of said Defendants is liable in some manner for the damages sued upon herein.

18. Plaintiffs are informed and believe, and thereon allege that MAIN and each Roe Defendant 1 through 100, inclusive, is the agent of and liable for the acts and omissions of the others.

19. Defendants ROES 101 through 200, inclusive, are natural persons sued herein under fictitious names for the reason that Plaintiffs are unaware of their true names and capacities; at such time as said true names and

capacities are ascertained, Plaintiffs will seek leave to amend this Complaint to substitute such true names for such fictitious names. Each of said Defendants is liable in some manner for the damages sued upon herein.

20. Plaintiffs are informed and believe, and thereon allege that PEAT, MARWICK and each Roe Defendant, 101 through 200, inclusive, is the agent of and liable for the acts and omissions of the others.

21. Defendants ROES 201 through 300, inclusive, are natural persons sued herein under fictitious names for the reason that Plaintiffs are unaware of their true names and capacities; at such time as said true names and capacities are ascertained, Plaintiffs will seek leave to amend this Complaint to substitute such true names for such fictitious names. Each of said Defendants is liable in some manner for the damages sued upon herein.

22. Plaintiffs are informed and believe, and thereon allege that COHN and each Roe Defendant, 201 through 300, inclusive, is the agent of and liable for the acts and omissions of the others.

FACTUAL BACKGROUND

23. *In Re COUSINS Securities Litigation*, filed in the United States Southern District of California and given Master File No. 84-1821-R(I) (hereafter *"COUSINS Securities Litigation"*), was a federal class action brought on behalf of the purchasers of COUSINS common stock between December 7, 1983, and July 18, 1984, (the "Class Period"). The plaintiffs in that action named as defendants various officers and directors of COUSINS during

the Class Period, RB Industries, Inc. (hereafter "RB"), and the co-lead underwriters of COUSINS' December 7, 1983, initial public offering, Wheat, First Securities, Inc., and Montgomery Securities, all of whom were insured under the WAUSAU Policy and/or the FEDERAL Policy. The plaintiffs therein alleged that the named defendants violated §§ 11, 12(2) and 13(b)(2) of the Securities Act, § 10(b) of the Exchange Act, and §§ 1507, 2254, 25400, 25401, 25500 and 25501 of the California Corporations Code. In addition, the plaintiffs asserted claims under California common law for fraud and negligent misrepresentation. The plaintiffs' federal securities claims as well as the pendent state law claims were certified by the United States District Court for the Southern District of California.

24. The plaintiffs in the *COUSINS Securities Litigation* alleged that since December 7, 1983, when COUSINS made its initial public offering of common stock through its Registration Statement and Prospectus (hereafter collectively and individually the "COUSINS Prospectus" as required by the context), and throughout the Class Period, the named defendants engaged in a scheme which was designed to distort COUSINS' state of business affairs and its financial condition by disseminating a series of materially false and misleading statements, and by omitting to state material facts. The complaint alleged that the defendants were in possession of or recklessly disregarded adverse information regarding COUSINS, its business and future business prospects, which served to make the COUSINS' Prospectus and other public statements materially misleading. It further alleged that the investing public, including the named plaintiffs and

others, who purchased COUSINS common stock during the Class Period (hereafter the "Class") did so at prices which were artificially inflated due to defendants' misrepresentations and omissions, and was damaged thereby.

25. The Class brought no claims against the Defendants herein.

Circumstances of the Loss

26. During the course of the *COUSINS Securities Litigation*, Plaintiffs determined that in their opinion at least some of their insureds had violated laws as alleged by the plaintiffs in the *COUSINS Securities Litigation*, and that, for a variety of legitimate reasons, it was in the best interests of their insureds that they settle with the Class.

27. The defendants in the *COUSINS Securities Litigation* and Plaintiffs herein made the settlement hereinafter described in faith under a reasonable belief that it was necessary to protect their interests, and based on a reasonable estimate of their liability at the time of the settlement.

28. The total amount paid by the Plaintiffs herein in cash resolve the liability of their insureds to the Class was $13,000,000 out of a total settlement of $13,500,000. The first payment of the settlement was made by WAUSAU on May 23, 1988; less than one year from the date of this lawsuit for contribution and equitable indemnity.

29. The wrongful course of conduct of the Defendants described herein proximately caused the loss of the

Plaintiffs and Class resulting in the legal consequences stated in the claims for relief set forth below.

Activities of MUSICK, CASTRO, SCHUCHARD and DOES 1 through 100, Inclusive, and Their Wrongful Conduct

30. COUSINS was incorporated in March of 1983 by RB and the former shareholders of SAL pursuant to a pre-incorporation agreement. MUSICK and CASTRO represented RB in connection with its investment in and the organization of COUSINS. After the organization of COUSINS, and at times relevant to this lawsuit, the MUSICK firm and CASTRO were principally responsible for the conduct and handling of the legal affairs of both COUSINS and RB.

31. COUSINS and its officers and directors retained the legal services of the MUSICK firm and CASTRO to, among other matters, provide advice and counsel in all matters concerning the public offering of common stock of COUSINS; draft and file all documents required by federal and state law in connection therewith, including without limitation the COUSINS Prospectus; make certain that COUSINS and its officers and directors complied with all federal and state laws applicable to the offering and satisfied their responsibilities in connection therewith; review, analyze and provide legal advice regarding certain statements and documents prior to public dissemination; and to provide legal representation in connection with related party transactions between COUSINS and RB. MUSICK assisted COUSINS and the named individual defendants in the *COUSINS Securities Litigation* in planning the December 1983 public stock sale, conducted

or participated in investigations into, among other matters, the business, operations, future business prospects, financial, accounting and management control of COUSINS, conducted due diligence investigations on behalf of the officers and directors, and met with various of the defendants named in the *COUSINS Securities Litigation* in connection with the contents of the COUSINS Prospectus, and all drafts thereof, and the financial information contained therein.

32. In connection with the foregoing legal services:

(a) the MUSICK firm, CASTRO and SCHUCHARD acted as counsel for COUSINS, a Delaware corporation, in connection with the sale by COUSINS of over 2,000,000 shares, at $15 per share, of COUSINS common stock in or about December, 1983. They prepared drafts of the company's Registration Statement on Form S-I, including the one originally filed on October 11, 1983, with the Securities and Exchange Commission under the Securities Act, as amended, as well as Amendment No. 1 thereto, filed on October 21, 1983, Amendment No. 2 thereto filed on November 30, 1983, Amendment No. 3 thereto filed on December 6, 1983, and Amendment No. 4 thereto filed on December 7, 1983, including as a part thereof a form of Prospectus covering the common shares, and, in connection with all of the foregoing, conducted "all hands" meetings and communicated with the Securities and Exchange Commission regulatory agencies of states in which COUSINS' stock was sold. Plaintiffs are informed and believe and thereon allege that, in connection with the foregoing these defendants conducted or participated in an investigation known as a "due diligence" investigation as part of the public offering.

(b) The MUSICK firm, CASTRO and SCHUCHARD reviewed, rendered legal advice and drafted textual material concerning non-expertised financial information published in the COUSINS Prospectus;

(c) The MUSICK firm and CASTRO reviewed and rendered legal advice concerning information contained in COUSINS' February 1984 "Report to Shareholders"; and

(d) The MUSICK firm and CASTRO represented both COUSINS and RB in connection with COUSINS' acquisition of RB's Mission Valley leasehold interest for $1,200,000.

33. The MUSICK firm, CASTRO and SCHUCHARD were reckless, grossly negligent and negligent, and by virtue thereof, misrepresented, actively concealed and failed to disclose or caused the failure to disclose, or caused to be misrepresented or concealed the following matters, which, as securities counsel, they knew or should have known would be relied upon by the market in general and by purchasers of the common stock of COUSINS, including the Class:

(a) Item 503(c) of regulation S-I, 17 C.F.R. Section 229.503(c) requires a registrant such as COUSINS to set forth on the page immediately following the cover page of the Prospectus or following the summary section of the Prospectus, under an appropriate caption, a discussion of the principal factors that make an offering speculative or one of high risk. Although the COUSINS Prospectus contained a section euphemistically entitled "Certain Considerations" on the page following the cover page, it failed to reveal the material risks associated with

an investment in COUSINS securities, including risks relating to (1) COUSINS' expansion plans; (2) sales not meeting expectations; (3) costs and expenses exceeding projected levels; (4) lack of internal accounting and management controls, procedures and systems; (5) logistic and supply problems in view of COUSINS expansion plans, which included opening 14 stores at once in the San Francisco area; (6) the difficulties and additional cost of delivering furniture in the San Francisco area as contrasted with other areas in which the company had previously operated; (7) risks of over-spending and the company's inability to control costs; and (8) the inventory control computer system, which the company believed was "an essential element of the company's profitability", being able to effectively handle the responsibilities required of it on the scale necessitated by the company's expansion program. MUSICK, CASTRO and SCHUCHARD as securities lawyers were reckless in not identifying these real and material risks and not drafting the COUSINS Prospectus to disclose them. In fact, all of these material risks subsequently materialized causing diminution in the price of COUSINS stock and resulting in damage to the Class.

(b) Item 501(c)(4) of regulation S-K, 17 C.F.R. Sections 229.501(c)(4) requires a registrant such as COUSINS to set forth on the outside front cover of the page of the prospectus, in bold face roman type at least as high as 10-point modern type and at least two points leaded, a cross reference to more detailed discussion elsewhere in the prospectus, of material risks in connection with the purchase of COUSINS stock. MUSICK, CASTRO

and SCHUCHARD as securities lawyers were reckless in not drafting the COUSINS Prospectus as required by law.

(c) In connection with two airplanes rented by COUSINS from related parties, MUSICK, CASTRO and SCHUCHARD wrote in the COUSINS Prospectus that COUSINS was unable to determine the comparative fair market rentals for the use of such planes. They then wrote that in the future COUSINS intended to have the terms and conditions of all transactions between itself and an officer or director approved by a majority of disinterested directors, and that such transactions would be on terms COUSINS believed to be at least as favorable as those obtainable from an unaffiliated third party. MUSICK, CASTRO and SCHUCHARD investigated and ascertained prior to the effective date of the COUSINS Prospectus what comparative fair market rentals for such planes would be and knew that the terms between COUSINS and the related parties were not fair and not at least as favorable as those obtainable from an unaffiliated third party. These Defendants knew the foregoing, yet drafted material misstatements concerning these related-party transactions which were included in the COUSINS Prospectus.

(d) In mid-February, 1984, in its "Report to shareholders" for the 4th Quarter ended December 31, 1983, COUSINS falsely reported that "the San Diego market is now profitable.". In reality, COUSINS' San Diego division was losing money. With full knowledge of the intended dissemination to COUSINS' shareholders, the MUSICK firm and CASTRO were asked to pass upon and render legal advice in connection with statements contained in the aforementioned "Report to Shareholders"

and were reckless, grossly negligent and negligent in carrying out their responsibilities.

(e) Prior to the effective date of the COUSINS prospectus, RB was negotiating with a company called United Furniture Company to purchase certain of its assets, including five leases to United Furniture retail stores, one of which was in Mission Valley. While no agreement had been reached as of the effective date of the COUSINS Prospectus between RB and COUSINS for RB to assign the Mission Valley lease to COUSINS, the Class in the *COUSINS Securities Litigation* asserted that the securities laws required disclosures relating to this contemplated transaction in COUSINS Prospectus. Within ninety (90) days of the effective date of the COUSINS Prospectus, RB and COUSINS did enter into a written agreement pursuant to which RB assigned the Mission Valley lease to COUSINS and COUSINS agreed to pay RB $1.2 million in key money. Defendants MUSICK and CASTRO represented RB in all matters relating to the acquisition of the Mission Valley leasehold and the other assets from United Furniture Company, were aware of and fully familiar with discussions between COUSINS and RB concerning the possible assignment by RB to COUSINS of the Mission Valley lease, and represented both RB and COUSINS in the transaction by which RB assigned the Mission Valley lease to COUSINS for $1.2 million. There is an obligation pursuant to Section 4(3) of the Securities Act, 15 U.S.C. § 77d, to maintain an accurate prospectus during the ninety (90) day period following an offering (the "evergreen period") – in the case of COUSINS, until March 7, 1984. The transaction for the assignment by RB to COUSINS of the Mission Valley lease was not only

material but constituted a related party transaction which required disclosure. The Class and the named defendants in the *COUSINS Securities Litigation* relied on MUSICK and CASTRO to make certain that COUSINS and its officers and directors complied with all laws, including without limitation those that required that the COUSINS Prospectus not contain material misstatements or omissions and that the COUSINS Prospectus remain accurate throughout the evergreen period. Defendants MUSICK and CASTRO were reckless, grossly negligent and negligent in carrying out their responsibilities, because they failed to comply with Section 4(3) of the Securities Act by failing to disclose this transaction during the "evergreen period".

Activities of MAIN, COHN, BACANI, and TORKAR, and ROES 1 through 100, and ROES 201 through 300, Inclusive, (the "Accountant Defendants") and Their Wrongful Conduct

34. Defendant BACANI served as the COHN audit engagement partner for the fiscal years 1981 and 1982 audits. Defendant TORKAR, as an employee of COHN, performed audit services for SAL and its subsidiaries and COUSINS for the fiscal years 1980, 1981 and 1982. In addition, Defendant TORKAR and other COHN personnel rendered accounting services to COUSINS and Defendant MAIN in connection with MAIN's fiscal year 1983 audit of COUSINS, despite the fact that from approximately March of 1983, a partner in the COHN firm, Benjamin Alpert, also served on the board of directors of COUSINS.

35. Defendants COHN, BACANI and TORKAR prepared and issued certified reports and financial statements for COUSINS and rendered accounting services in connection with the restatement of financial statements, all of which were included in the COUSINS Prospectus, knowing that said information would be communicated to purchasers of COUSINS common stock, such as the Class, through the COUSINS Prospectus, and that persons such as the members of the Class would rely thereon.

36. MAIN prepared and issued the certified report and financial statements at and as of June 30, 1983, which were included in the COUSINS Prospectus, knowing that said information would be communicated to purchasers of COUSINS common stock, such as the members of the Class, through the COUSINS Prospectus, and that they would rely thereon. In addition, Plaintiffs are informed and believe and thereon allege that MAIN participated in the preparation of post audit financial information included in the COUSINS Prospectus. MAIN also had legal responsibility for reviewing financial information and events subsequent to the date of the June 30, 1983, financials (referred to as an S-1 review) to ascertain whether information should be disclosed in the COUSINS Prospectus in order to prevent the financial information presented from being misleading. COHN and MAIN assisted MUSICK in the preparation and filing of the COUSINS Prospectus and, as a result their participation and investigation into the business operations and prospects and financial, accounting and management controls and systems of COUSINS, knew or recklessly disregarded

the false and misleading nature of the financial information contained in COUSINS Prospectus.

37. Plaintiffs are informed and believe and thereon allege that in connection with COUSINS Prospectus COHN and MAIN reviewed the interim financial statements included therein. COHN issued unqualified opinions that the financial statements of COUSINS for the years ended June 30, 1981 and 1982, fairly presented the condition of COUSINS under GAAP. MAIN issued an unqualified opinion on the financial statements for COUSINS for the year ended June 30, 1983, which stated that they fairly presented the financial condition of COUSINS. Said opinions were false and misleading in that COHN and MAIN knew, or but for their recklessness would have known, that the audited financial statements of COUSINS were false and misleading as specified below. Moreover, COHN and MAIN knew, or but for their recklessness would have known, of substantial operating problems of SAL and COUSINS, including the lack of adequate internal accounting and management controls. Notwithstanding the foregoing, COHN and MAIN improperly relied on management representations, including but not limited to company-prepared financial statements and SAL's and COUSINS' unreliable or nonexistent internal controls. Plaintiffs are informed and believe and thereon allege that COHN and MAIN performed reviews on COUSINS' unaudited financial statements included in the COUSINS Prospectus and either knowingly, recklessly or negligently failed to disclose that the unaudited financial statements for the years ended June 30, 1979 and 1980, and for the first quarter of

fiscal year 1984, ended September 30, 1983, were materially false and misleading.

38. COHN and MAIN, in reporting on COUSINS' financial statements, stated that their examinations were made "in accordance with generally accepted auditing standards . . . ". This statement is false and misleading in that the following auditing standards approved and adopted by the membership of the American Institute Certified Public Accountants ("AICPA"), among others, were violated:

(a) AICPA General Standard No. 3 was violated, which requires that due professional care be exercised in the performance of the examination and in the preparation of the report.

(b) AICPA Standard of Field Work No. 2 was violated, which requires that there be a proper study and evaluation of the existing internal controls as a basis for reliance thereon and for determining the extent of testing to be performed during the audit.

(c) AICPA Standard of Field Work No. 3 was violated, which requires that sufficient competent evidential matter be obtained through inspection, observation, inquiries, and confirmation to afford a reasonable basis for an opinion regarding financial statements under examination.

(d) AICPA Standard of Reporting No. 1 was violated, in that COHN and MAIN falsely represented that the financial statements were presented in accordance with GAAP when in fact such statements were not so presented, as described below.

(e) AICPA Standard of Reporting No. 3 was violated, which requires that information disclosures in the financial statements be reasonably adequate unless otherwise stated in the report.

39. COHN and MAIN also knew or were reckless, grossly negligent, and negligent in disregarding facts which indicated that the financial statements in the COUSINS Prospectus were presented in a manner which violated the following generally accepted accounting principles, among others:

(a) The principle of adequacy and fairness of disclosure was violated, since information was not presented in a way that facilitated understanding and avoided erroneous implications. (Statement No. 4 of Accounting Principles Board ("Statement No. 4"), paragraph 106.)

(b) The principle that a conservative approach is appropriate, for, among other matters, minimizing the amount of net assets and income reported, was violated, (Statement No. 4, paragraph 35).

(c) The principle that the economic substance of transactions should be emphasized rather than formal considerations violated. (Statement No. 4, paragraph 35.)

(d) The principle that the financial information presented should be complete was violated. (Statement No. 4, paragraph 94.)

40. In addition, the Accountant Defendants were reckless, grossly negligent and negligent, and by virtue thereof, misrepresented, actively concealed and failed to disclose or caused the failure to disclose, or caused to be

misrepresented or concealed the following matters, which the Accountant Defendants knew or should have known would be relied upon by the market in general and by purchasers of the common stock of COUSINS, including Class:

Change in Revenue Recognition Policy.

(a) Shortly before the December 1983 initial public offering, COUSINS changed its revenue recognition accounting policy restated its prior periods' financial statements to reflect the change. The change was from a generally accepted policy used in furniture industry to one rarely utilized. The restated financial statements prepared for inclusion by COHN in the COUSINS Prospectus were presented without required disclosures of the fact change, the nature of the change, the justification for the change, the financial effect of the change for the period when the change was effectuated, the effect on prior periods, or the impact on subsequent periods. These omissions violated Regulation S-X as embodied in 17 C.F.R. § 210.1-01 *et seq.* and GAAP. The actual effect of the change in the revenue recognition policy was to inflate revenues and earnings. COHN and MAIN falsely represented that the financial statements in COUSINS Prospectus were prepared in accordance with GAAP. They were in fact not so prepared.

(b) The failure to disclose the material change in accounting policy was exacerbated because Accounting Principles Board Statement No. 20 allowing a one-time exception for the retroactive restatement of a company's financial statement was not available to COUSINS.

COUSINS had previously issued and delivered financial statements to RB in connection with RB's investment of $3,000,000 in additional capital in April of 1983. Accounting Principles Board Statement No. 20 forbade utilization of the one-time exception after the RB investment.

(c) The change in the method of revenue recognition was also improper because COUSINS did not have the accounting records necessary to restate prior financial statements. The Accountant Defendants were responsible for a response to a Securities and Exchange Commission comment letter indicating that COUSINS' revenue recognition policies were based on historical information. The Accountant Defendants were aware that no such historical information existed at the time the restatements were being made.

(d) The change in the method of revenue recognition had a substantial impact on COUSINS' reported earnings for the three-month "stub" period covering July 1, 1983 through September 30, 1983 – the last reporting period included in the COUSINS Prospectus prior to the December 1983 public offering. The effect of the failure by the Accountant Defendants to describe the change in the accounting for revenue recognition, its nature, the justification for it, and its effect in artificially inflating COUSINS' revenues and net income was a failure to disclose material facts necessary to make the statements made, including without limitation, the audited financials and the notes thereto, in light of the circumstances in which they were made, not misleading. This was especially important because the initial offering of COUSINS common stock was sold to the public at a very high

multiple of earnings based on the inflated earnings figures.

Computer Programming Expenses.

(e) In connection with the restatement of financial statements included within the COUSINS Prospectus, the Accountant Defendants caused the elimination of a write-off of computer programming expenses originally included in SAL's 1979 financials. The elimination of this item, along with other accounting manipulations, caused COUSINS to report in the COUSINS Prospectus $46,000 profit for 1979, as opposed to a $86,000 loss as originally shown by COHN's 1979 audited financial statements for SAL. The effect of this change in accounting treatment, as well as others, was to give COUSINS and its predecessor an appearance of profitability over a five-year period.

(CLAIMS FOR RELIEF)

(First Claim for Relief)

(Contribution Under Federal Law Based on Violations of § 10(b) of the Exchange Act, 15 U.S.C. § 78(j)(b), and the Securities 10b-5, 17 C.F.R. § 240. 10b-5)

41. Plaintiffs reallege and incorporate herein by this reference as though fully set forth the allegation in paragraphs 1 through 33, inclusive, above.

42. This claim for relief is directed by the Plaintiffs against Defendants MUSICK, CASTRO, SCHUCHARD and DOES 1 through 100, inclusive, (the "Section 10(b) Attorney Defendants") and seeks apportionment of the loss under federal principles of contribution occasioned

by the wrongful conduct of the Section 10(b) Attorney Defendants as the ends of justice require.

43. The COUSINS common stock purchased by members of the Class, are securities within the meaning of the Exchange Act, 15 U.S.C., § 78(c)(a)(10).

44. In failing to disclose the facts and in making the misrepresentations set forth in paragraphs 30 through 33, inclusive, and 40 above, the Section 10(b) Attorney Defendants violated Section 10(b) of the Exchange Act, 15 U.S.C., § 78(j)(b) and Rule 10b-5 C.F.R. § 240.10b-5, promulgated thereunder by the Securities and Exchange Commission.

45. The Section 10(b) Attorney Defendants made the misrepresentations and omissions with a reckless disregard for their falsity and materiality and with a reckless disregard that said conduct constituted violations of the federal securities laws.

46. The Section 10(b) Attorney Defendants intended by said misrepresentations and omissions to induce persons such as members of the Class to purchase COUSINS common stock. The Class relied upon these Defendants' misrepresentations and omissions, and would not have purchased the securities had they known the true and material facts, or would not have paid the inflated prices they paid for such securities at the time they purchased them.

47. At all times relevant hereto, each of the Section 10(b) Attorney Defendants knew or were reckless in not knowing that each of the Section 10(b) Accounting Defendants was acting in violation of Section 10(b). Each of

these Section 10(b) Attorney Defendants nevertheless knowingly rendered substantial assistance to said violations of Section 10(b) as set forth in paragraphs 34 through 40, inclusive, above. Accordingly, each of the Section 10(b) Attorney Defendants is liable for aiding and abetting violations of Section 10(b) by each of the other Section 10(b) Accountant Defendants.

48. As a direct and proximate result of these Defendants' violations of Section 10(b) and Rule 10b-5, the Class was damaged in an amount not less than $13,500,000 in connection with their purchase of COUSINS common stock.

49. By reason of the settlement described in paragraphs 26 through 28, inclusive, above, the Plaintiffs herein, on behalf of their insureds, compensated the Class for a portion of their loss by payment of $13,000,000 in cash.

50. As between the Plaintiffs as the subrogee of the defendants named in the *COUSINS Securities Litigation* (on whose behalf Plaintiffs paid $13,000,000), and the Section 10(b) Attorney Defendants, responsibility for the damages incurred by the Class rests entirely or partially on these Section 10(b) Attorney Defendants by reason of their violations of Section 10(b) and Rule 10b-5 as alleged herein. As a result, the Section 10(b) Attorney Defendants, and each of them, are obligated to pay by way of contribution to the Plaintiffs for the sums they paid to the Class.

51. By reason of the foregoing, Plaintiffs are entitled to contribution, in whole or in part, from the Section 10(b)

Attorney Defendants in an amount to be determined at trial according to proof.

(Second Claim for Relief)

(Equitable Indemnity Under State Law Based on Violations of Section 10(b) of the Exchange Act, 15 U.S.C., Section 78(j)(b) and Securities and Exchange Commission Rule 10b-5, 17 C.F.R., Section 240. 10b-5)

52. Plaintiffs reallege and incorporate herein by this reference as though fully set forth the allegations in paragraphs 1 through 33, inclusive, and 43 through 50, inclusive, above.

53. This claim for relief is directed by the Plaintiffs against Defendants MUSICK, CASTRO, SCHUCHARD and DOES 1 through 100, inclusive, (the "Section 10(b) Attorney Defendants"), and seeks apportionment of the loss under state law principles of implied equitable indemnity occasioned by the wrongful conduct of the Section 10(b) Attorney Defendants as the ends of Justice require.

54. By reason of the foregoing, Plaintiffs are entitled to equitable indemnity, in whole or in part, from the Section 10(b) Attorney Defendants in an amount to be determined at trial according to proof.

(Third Claim for Relief)

(Contribution under Federal Law Based on Violation of Section 10(b) of the Exchange Act, 15 U.S.C. Section 78(j)(b), and the Securities and Exchange Commission Rule 10b-5, 17 C.F.R., Section 240. 10b-5)

55. Plaintiffs reallege and incorporate herein by this reference as though fully set forth the allegations in paragraphs 1 through 29, inclusive, 34 through 40, inclusive, and 43 above.

56. This claim for relief is directed by the Plaintiffs against Defendants MAIN, PEAT, MARWICK, COHN, BACANI, TORKAR and ROES 1 through 300, inclusive (the "Section 10(b) Accountant Defendants") and seeks apportionment of the loss based on federal principles of contribution occasioned by the wrongful conduct of the Accountant Defendants as the ends of Justice require.

57. In failing to disclose the facts and in making the misrepresentations set forth in paragraphs 34 through 40, inclusive, above, the Accountant Defendants violated Section 10(b) of the Exchange Act, 15 U.S.C., § 78(j)(b) and Rule 10b-5 C.F.R. § 240.10b-5, promulgated thereunder by the Securities and Exchange Commission.

58. The Accountant Defendants made the misrepresentations and omissions with a reckless disregard for their falsity and materiality and with a reckless disregard that said conduct constituted violations of the federal securities laws.

59. The Accountant Defendants intended by said misrepresentations and omissions to induce persons such as members of the Class to purchase COUSINS common

stock. The Class relied upon these Defendants' misrepresentations and omissions, and would not have purchased the securities had they known the true and material facts, or would not have paid the inflated prices they paid for such securities at the time they purchased them.

60. At all times relevant hereto, each of the Accountant Defendants knew or were reckless in not knowing that each of the Section 10(b) Attorney Defendants was acting in violation of Section 10(b). Each of these Accountant Defendants nevertheless knowingly rendered substantial assistance to said violations of Section 10(b) as set forth in paragraphs 30 through 33, inclusive, above. Accordingly, each of the Section 10(b) Accountant Defendants is liable for aiding and abetting violations of Section 10(b) by each of the other Section 10(b) Attorney Defendants.

61. As a direct and proximate result of these Defendants' violations of Section 10(b) and Rule 10b-5, the Class was damaged in an amount not less than $13,500,000 in connection with their purchase of COUSINS common stock.

62. By reason of the settlement described in paragraphs 26 through 28, inclusive, above, the Plaintiffs herein, on behalf of their insureds, compensated the Class for a portion of their loss by payment of $13,000,000 in cash.

63. As between the Plaintiffs as the subrogee of the defendants named in the *COUSINS Securities Litigation* (on whose behalf Plaintiffs paid $13,000,000), and the Section 10(b) Accountant Defendants, responsibility for

the damages incurred by the Class rests entirely or partially on these Section 10(b) Accountant Defendants by reason of their violations of Section 10(b) and Rule 10b-5 as alleged herein. As a result, the Section 10(b) Accountant Defendants, and each of them, are obligated to pay by way of contribution to the Plaintiffs for the sums they paid to the Class.

64. By reason of the foregoing, Plaintiffs are entitled to contribution, in whole or in part, from the Section 10(b) Accountant Defendants in an amount to be determined at trial according to proof.

(Fourth Claim for Relief)

(Equitable Indemnity Under State Law Based on Violations of Section 10b of the Exchange Act, 15 U.S.C. Section 78(j)(b) and Securities and Exchange Commission Rule 10b-5, 17 C.F.R., Section 240.10b-5)

65. Plaintiffs reallege and incorporate by this reference as though fully set forth the allegations in paragraphs 1 through 29, inclusive, 34 through 40, inclusive, 57 through 63, inclusive, and 43 above.

66. This claim for relief is directed by Plaintiffs against Defendants MAIN, PEAT, MARWICK, COHN, BACANI, TORKAR and ROES 1 through 300, inclusive (the "Section 10(b) Accountant Defendants"), seeks apportionment of the loss under state law principles of implied equitable indemnity occasioned by the wrongful conduct of Accountant Defendants as the ends of justice require.

67. By reason of the foregoing, Plaintiffs are entitled to equitable indemnity, in whole or in part, from the Section 10(b) Accountant Defendants in an amount to be determined at trial according to proof.

(Fifth Claim for Relief)

(Contribution Under Federal Law Based on Violations of Section 11 of the Securities Act, 15 U.S.C. Section 77k)

68. Plaintiffs reallege and incorporate by this reference as though fully set forth the allegations in paragraphs 1 through 29, inclusive, 34 through 40, inclusive, and 43 above.

69. This claim for relief is directed by the Plaintiffs against Defendants MAIN, PEAT, MARWICK, COHN, BACANI, TORKAR and ROES 1 through 300, inclusive (the "Section 11 Defendants") and seeks apportionment of loss under federal principles of contribution occasioned by the wrongful conduct of the Section 11 Defendants as the ends of justice require.

70. In failing to disclose the facts and in making the misrepresentations set forth in paragraphs 34 through 40, inclusive, above, the Accountant Defendants violated Section 11 of the Securities Act, 15 U.S.C. § 77k.

71. Each of the Accountant Defendants knowingly rendered substantial assistance in the violations of Section 11, set forth in paragraphs 34 through 40, inclusive, above. Each of the Accountant Defendants are liable for aiding and abetting violations of Section 11 by each of the other Accountant Defendants. As a direct and proximate result of these Defendants' violations of Section 11, the

Class was damaged in an amount not less than $13,500,000 in connection with their purchases of COUSINS common stock.

72. As between the Plaintiffs as the subrogees of the defendants named in the *COUSINS Securities Litigation* (on whose behalf Plaintiffs paid $13,000,000), and the Section 11 Defendants, responsibility for damages incurred by the Class rests entirely or partially on these Section 11 Defendants by reason of their violations of Section 11 as alleged herein. As a result, the Section 11 Defendants, and each of them, are obligated to pay by way of contribution to the Plaintiffs for the sums they paid to the Class.

73. By reason of the foregoing, Plaintiffs are entitled to contribution, in whole or in part, from the Section 11 Defendants in an amount to be determined at trial according to proof.

(Sixth Claim for Relief)

(Equitable Indemnity Under State Law Based on Violations of Section 11 of the Securities Act, 15 U.S.C., Section 77k)

74. Plaintiffs reallege and incorporate by this reference as though fully set forth the allegations in paragraphs 1 through 29, inclusive, 34 through 40, inclusive, 43 and 70 through 72, inclusive above.

75. This claim for relief is directed by the Plaintiffs against Defendants MAIN, PEAT, MARWICK, COHN, BACANI, TORKAR, and ROES 1 through 300, inclusive (the "Section 11 Defendants"), and seeks apportionment

of the loss under state law principles of implied equitable indemnity occasioned by the wrongful conduct of the Section 11 Defendants as the ends of justice require.

76. By reason of the foregoing, Plaintiffs are entitled to equitable indemnity, in whole or in part, from the Section 11 Defendants in an amount to be determined at trial according to proof.

(Seventh Claim for Relief)

(Equitable Indemnity Based on Violations of California Corporations Code § 25401, 25501, 25504.1 and 25504.2)

77. Plaintiffs reallege and incorporate by this reference as though fully set forth the allegations in paragraphs 1 through 29, inclusive, 34 through 40, inclusive, and 43 above.

78. This claim for relief is directed by Plaintiffs against Defendants MAIN, PEAT, MARWICK, COHN, BACANI, TORKAR and ROES 1 through 300, inclusive, (collectively referred to in this claim for relief as the "Corporations Code Defendants") and seeks full or partial indemnity from them under state law principles of implied equitable indemnity occasioned by the wrongful conduct of the Corporations Code Defendants as the ends of justice require.

79. By reason of the foregoing allegations, the Corporations Code Defendants have violated sections 25401 and 25501 of the California Corporations Code and are liable pursuant to Sections 25504.1 and 25504.2 of the California Corporations Code.

80. The Corporations Code Defendants materially assisted violations of Section 25401 by COUSINS with the intent to deceive or defraud the purchasers of COUSINS securities, including the Class, in violation of Corporations Code Section 25504.1.

81. The Corporations Code Defendants were named in the COUSINS Prospectus with respect to financial information which contained an untrue statement of material facts and which omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, in violation of Corporations Code Section 25504.2.

82. As a direct and proximate result of the Accountant Defendants' violations of Section 25401, 25504.1 and 25504.2, the Class was damaged in an amount not less than $13,500,000 in connection with their purchases of COUSINS common stock.

83. By reason of the settlement described in paragraphs 26 through 28, inclusive, above, the Plaintiffs compensated the Class for a portion of their losses by payment of $13,000,000 in cash.

84. As between the Plaintiffs, as subrogees of the defendants named in the *COUSINS Securities Litigation* (on whose behalf Plaintiffs paid $13,000,000), and the Corporations Code Defendants, responsibility for the damages incurred by the Class rests entirely or partially on the Corporations Code Defendants by reason of their violations of Corporations Code Sections 25401, 25504.1 and 25504.2 as herein alleged. As a result, the Corporations Code Defendants, and each of them, are obligated to

fully or partially indemnify Plaintiffs for the sums they paid to the Class.

85. By reason of the foregoing, Plaintiffs are entitled to equitable indemnity, in whole or in part, from the Corporations Code Defendants in amounts to be determined at trial according to proof.

(Eighth Claim for Relief)

(Equitable Indemnity Based on Negligence)

86. Plaintiffs reallege and incorporate by this reference as though fully set forth the allegations in paragraphs 1 through 33, inclusive, and 47 above.

87. This claim for relief is directed by Plaintiffs against Defendants MUSICK, CASTRO, SCHUCHARD and DOES 1 through 100, inclusive, (collectively referred to in this claim for relief as the "Attorney Defendants"). This claim is based upon negligent acts or omissions, and breaches of the duties of care, diligence and skill these Attorney Defendants owed to purchasers of COUSINS securities, including the Class. Plaintiffs seek full or partial indemnity from the Attorney Defendants under state law principles of implied equitable indemnity based on their negligence as the ends of justice require.

88. Having been retained and having acted as legal counsel for COUSINS and on behalf of its directors and officers for the purpose of furnishing a myriad of legal services, among them specific services designed to induce or reasonably expected to influence prospective purchasers of COUSINS common stock, including the Class, the Attorney Defendants undertook the duty to such

persons to perform those services in accordance with the ordinary care, diligence, skill and integrity exercised by members of the legal profession. Among the obligations undertaken by the Attorney Defendants was the duty to prepare the COUSINS Prospectus and any required amendments thereto in full compliance with federal and state law and to prepare and provide advice and counsel with respect to written communication that they knew and/or reasonably should have foreseen, would be relied upon by purchasers of COUSINS securities, including the Class, in a manner that fairly and adequately disclosed matters pertaining to COUSINS, its business operations and prospects, financial, accounting and management control systems, its financial history, risks associated with an investment in COUSINS securities, related party transaction and its finances and financial difficulties.

89. In undertaking its obligations as legal counsel to COUSINS and on behalf of its officers and directors in all matters relating to the offering of COUSINS securities, the Attorney Defendants knew and/or reasonably should have foreseen that purchasers of COUSINS securities, including members of the Class, in determining whether to purchase COUSINS securities and at what prices, would rely upon the exercise by the Attorney Defendants of ordinary care, diligence, skill and integrity in the performance of their duties relating to the offering of COUSINS securities and information disseminated about COUSINS, its finances and business operations.

90. The Attorney Defendants owed to the purchasers of COUSINS securities, including to members of the Class, the duty of care, diligence and skill set forth above. By reason of the acts and omissions set forth

herein, including without limitations those matters alleged in paragraphs 30 through 33, inclusive, and 47 above, the Attorney Defendants breached their duties of care, diligence and skill to the purchasers of COUSINS securities, including the Class, and Defendant MUSICK breached its duty of supervision and control.

91. As a direct and proximate result of the Attorney Defendants' acts and/or omissions in violation of their duties of ordinary care, diligence, skill and supervision and control, the Class suffered damages in an amount not less than $13,500,000.

92. As between the Plaintiffs as the subrogee of the defendants named in the *COUSINS Securities Litigation* (on whose behalf Plaintiffs paid $13,000,000), and the Attorney Defendants, responsibility for the damages incurred by the Class rests entirely or partially on these Attorney Defendants by reason of their negligence as alleged herein. As a result, the Attorney Defendants, and each of them, are obligated to fully or partially indemnify the Plaintiffs for the sums they paid to the Class.

93. By reason of the foregoing, Plaintiffs are entitled to equitable indemnity, in whole or in part, from the Attorney Defendants in an amount to be determined at trial according to proof.

(Ninth Claim for Relief)

(Equitable Indemnity Based on Negligence)

94. Plaintiffs reallege and incorporate by this reference as though fully set forth the allegations in paragraphs 1 through 29, inclusive, 34 through 40, inclusive, and 60 above.

95. This claim for relief is directed by Plaintiffs against Defendants MAIN, PEAT, MARWICK, COHN, BACANI, TORKAR and ROES 1 through 300, inclusive, (collectively referred to in this claim for relief as the "Negligent Accountant Defendants"). This claim is based upon negligent acts or omissions, and breaches of the duties of care, diligence and skill the Accountant Defendants owed to purchasers of COUSINS securities, including the Class. Plaintiffs seek full or partial indemnity from the Negligent Accountant Defendants under state law principles of implied equitable indemnity based on their negligence as the ends of justice require.

96. Having been retained and having acted as certified public accountants for COUSINS for the purpose of furnishing a myriad of services, among them specific services designed to induce or reasonably expected to influence prospective purchasers of COUSINS common stock, including the Class, the Accountant Defendants undertook the duty to such persons to perform those services in accordance with the ordinary care, diligence, skill and integrity exercised by members of the accounting profession. Among the obligations undertaken by the Accountant Defendants was the duty to prepare financial information for inclusion in the COUSINS Prospectus in full compliance with federal and state law, and to prepare

and provide advice and counsel with respect to financial information that they knew and/or reasonably should have foreseen, would be relied upon by purchasers of COUSINS securities, including the Class, in a manner that fairly and adequately disclosed matters pertaining to COUSINS, its business operations and prospects, financial, accounting and management control systems, its financial history, and its finances and financial difficulties. Additionally, COHN had a duty to perform accounting services with appropriate professional independence and integrity unaffected by conflict of interest. It breached that duty by rendering auditing services in connection with certified financial statements included in the COUSINS Prospectus, while one of its partners served on the board of directors of its client, COUSINS.

97. In undertaking its obligations as certified public accountants to COUSINS, the Accountant Defendants knew and/or reasonably should have foreseen that purchasers of COUSINS securities, including members of the Class, in determining whether to purchase COUSINS securities, would rely upon the exercise by the Accountant Defendants of ordinary care, diligence, skill and integrity in the performance of their duties relating, among other matters, to the financial information prepared for inclusion by them in the COUSINS Prospectus.

98. The Accountant Defendants owed to the purchasers of COUSINS securities, including to members of the Class, the duty of care, diligence and skill set forth above. By reason of the acts and omissions set forth herein, including without limitations those matters alleged in paragraphs 34 through 40, inclusive, and 60 above, the Accountant Defendants breached their duties

of care, diligence and skill to the purchasers of COUSINS securities, including the Class, and Defendants MAIN and COHN breached their duty of supervision and control.

99. As a direct and proximate result of the Accountant Defendants' acts and/or omissions in violation of their duties of ordinary care, diligence, skill and supervision and control, the Class suffered damages in an amount not less than $13,500,000.

100. As between the Plaintiffs as the subrogee of the defendants named in the *COUSINS Securities Litigation* (on whose behalf Plaintiffs paid $13,000,000), and the Negligent Accountant Defendants, responsibility for the damages incurred by the Class rests entirely or partially on the Negligent Accountant Defendants by reason of their negligence as alleged herein. As a result, the Negligent Accountant Defendants, and each of them, are obligated to fully or partially indemnify the Plaintiffs for the sums they paid to the Class.

101. By reason of the foregoing, Plaintiffs are entitled to indemnity, in whole or in part, from the Attorney Defendants in an amount to be determined at trial according to proof.

PRAYER

WHEREFORE, Plaintiffs pray for judgment as follows:

1. *On the First, Third and Fifth Claims for Relief:*

(a) For contribution and damages according to proof;

2. *On the Second, Fourth, Six, Seventh, Eighth and Ninth Claims for Relief:*

(a) For complete or partial indemnity and damages according to proof; and

3. *On all Claims for Relief:*

(a) For reasonable attorneys' fees incurred herein;

(b) For costs of suit incurred herein; and

(c) For such other and further relief as the Court may deem proper.

Dated: July 17, 1989

Respectfully submitted,

NAGLER & SCHNEIDER

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JURY DEMAND

Plaintiffs demand a trial by jury.

DATED: July 17, 1989

Respectfully submitted,

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Supreme Court, U.S.
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NOV 19 1992
CLERK

No. 92-34

In The

Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR,

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether federal courts may imply a private right to contribution in Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission?

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 954 F.2d 575 and Fed. Sec. L. Rep. (CCH) ¶ 96,486. The Opinion is reprinted at page 1 of the Appendix to the Petition for a Writ of Certiorari.

The Memorandum and Order of the United States District Court for the Southern District of California is reported at Fed. Sec. L. Rep. (CCH) ¶ 95,208. The Memorandum and Order is reprinted at page 14 of the Appendix to the Petition for a Writ of Certiorari.

JURISDICTION

The decision of the Court of Appeals was entered on January 23, 1992. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on May 28, 1992. Petitioners filed their Petition for a Writ of Certiorari on July 2, 1992. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

(a) . . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5, provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

STATEMENT OF THE CASE

The *Cousins* Case.

Certain individuals in 1984 filed a securities class action denominated *In re Cousins Securities Litigation*, No. 84-1821-B(IEG) in the United States District Court for the Southern District of California. Defendants in the case consisted primarily of Cousins Home Furnishings, Inc. and its directors and officers. (J.A. 14-15.) After extensive discovery, the *Cousins* case was settled for $13,500,000, of which Employers Insurance of Wausau and Federal Insurance Company paid all but $500,000. (J.A. 16.)

Parties to Respondents' Lawsuit.

Respondents, Employers Insurance of Wausau and Federal Insurance Company, provided insurance to certain of the defendants in the *Cousins* case. (J.A. 5-6.) Petitioners are attorneys, accountants and their firms.[1] Petitioners provided professional services to some of the *Cousins* defendants during the time defined as the class period in the *Cousins* case. (J.A. 8-11.)

Respondents' Lawsuit.

Respondents sued Petitioners for damages approximately eight months after the *Cousins* case concluded. (J.A. 16.) Respondents allege they are subrogated to the

[1] The parties to the proceeding in the court below are the Petitioners named in the caption, K.M.G. Main Hurdman and Peat Marwick, Main & Co., and the Respondents named in the caption.

rights of the defendants in the *Cousins* case whose settlement Respondents funded. (J.A. 32, 35.)

Respondents' First Claim for Relief makes a claim against Petitioners Musick, Peeler & Garrett, Castro and Schuchard for contribution under § 10(b) of the Securities Exchange Act of 1934 ("the 1934 Act") and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5 ("Rule 10b-5"). (J.A. 30-32.) Respondents' Third Claim for Relief makes a claim against Petitioners J.H. Cohn & Co., Bacani and Torkar for contribution under § 10(b) of the 1934 Act and Rule 10b-5. (J.A. 34-35.)

The District Court granted Petitioners' motion to dismiss Respondents' lawsuit. Judgment of dismissal was entered April 12, 1990. Respondents appealed.

The Ninth Circuit Decision.

The Court of Appeals reversed the District Court in a published opinion. The Court of Appeals acknowledged neither § 10(b) of the 1934 Act nor Rule 10b-5 provides an explicit right of contribution. The Court of Appeals reaffirmed its rule implying a private right of contribution in section 10(b) and Rule 10b-5.[2] *Smith v. Mulvaney*, 827 F.2d 558, 561 (9th Cir. 1987). The Court of Appeals went on to

[2] The Ninth Circuit firmly enforces a rule forbidding any three judge panel from overruling a previous Ninth Circuit panel decision. *United Scottish Ins. Co. v. United States*, 614 F.2d 188, 191 (9th Cir. 1980); *Pratt v. McCarthy*, 850 F.2d 590, 593 (9th Cir. 1988), *reh'g denied*, 878 F.2d 33 (9th Cir. 1989); *Hard v. Burlington N.R.R. Co.*, 870 F.2d 1454 (9th Cir. 1989); *Owen v. Commissioner of Internal Revenue*, 881 F.2d 832, 834 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

rule that settling defendants' representations that they paid their "fair share" of damages did not waive or bar their claims for contribution.

Petition for Rehearing.

Petitioners sought rehearing and suggested rehearing *en banc*. While the petition and suggestion were pending, the Eighth Circuit published its decision in *Chutich v. Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992), *reh'g en banc denied*, 1992 U.S. App. LEXIS 10390 (8th Cir. 1992) holding federal courts lack the power to imply a private right of contribution in § 10(b) of the 1934 Act and Rule 10b-5. Petitioners called the Ninth Circuit's *en banc* attention to the Eighth Circuit's decision and asked the Ninth Circuit to overrule *Smith v. Mulvaney*, resolving the circuit conflict. The Ninth Circuit denied the petition and rejected the suggestion of rehearing *en banc*.

Certiorari

On October 5, 1992, the Court granted certiorari.

SUMMARY OF ARGUMENT

Whenever the Court implies a private right of civil action in a silent statute, it appropriates part of the separate legislative power of Congress. U.S. Const. art I, § 1. If Congress has not granted the Court legislative power, the seizure arrogates a function the people granted to Congress. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979); *Touche Ross & Co. v. Redington*, 442

U.S. 560, 568, 578 (1979). Respondents in this case seek such an arrogation.

Indisputably, § 10(b) of the 1934 Act expresses no right of contribution. The Court has never implied a right of contribution in a silent statute. The Court rejected such calls twice, holding Congress must create contribution rights "either expressly or by clear implication. . . ." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981).[3] Contribution is a right of a wrongdoer, and the Court rightly requires clear and unequivocal proof of Congress' intent to benefit wrongdoers before implying a right of contribution in a statute that does not expressly grant contribution.

I.A. After taking a liberal approach to implication of private rights of action in federal criminal and regulatory statutes, almost as a common law court, the Court in seven decisions, all within five years, determined that federal courts may only imply private rights in a statute if Congress intended to create them. Thereafter, including in its last Term, the Court has consistently applied its principled approach of interpreting Congress' legislation rather than legislating.

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[3] In full, the Court held:

> [A] right of contribution may arise in either of two ways: first, through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or, second, through the power of federal courts to fashion a federal common law of contribution.

Texas Industries, Inc., 451 U.S. at 638.

I.B. Contribution is a right of a wrongdoer. In its jurisprudence of implied private rights, the Court has required "clear implication" before it will recognize any right of contribution not expressly created by Congress.

I.C. Respondents admit their subrogors violated § 10(b) and thus were guilty of recklessly or intentionally misleading investors. The underlying claims against the subrogors were, themselves, implied rights; § 10(b) creates no express civil remedy. The Court acquiesced in lower courts' implication of the investors' remedy and necessarily "fleshed out" that remedy by regarding congressional intent describing the regulatory scope of § 10(b). The Court has carefully limited the § 10(b) civil action. The Court has also declared that once a private civil claim is recognized, rightly or wrongly, federal courts have no general license to extend it. *Virginia Bankshares, Inc. v. Sandberg*, No. 89-1448, slip op. at 17, 115 L.Ed.2d 929, 951 (June 27, 1991). The fact that the subrogors' wrongdoing resulted in enforcement of an implied right is no excuse for granting them a different implied right.

I.D. Analysis of Congress' intent rejects implication of a right of contribution in § 10(b). Respondents are members of the class whose activities Congress intended to regulate for the protection and benefit of investors and the public. Nothing in § 10(b) suggests Congress intended to confer any right or privilege on perpetrators of fraud or manipulation in violation of § 10(b). Although the Court could terminate analysis with the language of § 10(b), other modes of analyzing Congress' intent lead to the same result. The legislative history is silent regarding Congress' reasons for granting contribution under some

but not all sections of the 1933 and 1934 Acts which expressly create private civil claims. At least one other right of a defendant, which Congress clearly intended to suppress abusive litigation under the 1933 and 1934 Acts, has never been implied as a defendants' right in § 10(b). When it enacted § 10(b), Congress probably intended the section only to be a delegation of regulatory power to the Securities and Exchange Commission ("Commission"). Judicial implication of a private claim exceeded Congress' plan and may have impaired it; the Court should not imply additional private rights Congress did not anticipate. Alternatively, if Congress expected the development of an implied investors' claim, it also anticipated federal courts would refuse to imply a right of contribution because in 1934 even common law courts left the creation of contribution rights to legislatures. Textual analysis of the 1933 Act and the 1934 Act as a whole demonstrates there is no pattern in Congress' creation and omission of contribution rights from which one could, by analogy, construct an intention to supply contribution rights to § 10(b) violators if Congress had anticipated the implied investors' civil remedy under § 10(b). Lower courts which have implied a right of contribution in § 10(b) have applied a federal common law and policy analysis either pre-dating, ignoring or defying the Court's description of federal judicial authority.

II.A. Federal common law cannot support creation of a right of contribution. Section 10(b) is not a rule in admiralty, nor does it implicate uniquely federal proprietary interests justifying the creation of federal common law, nor in the highly sophisticated and integrated

scheme of federal securities regulation did Congress mantle the judiciary to promulgate federal common law.

II.B. If the Court could create federal common law, it should not create a right of contribution in § 10(b) cases. Contribution does not promote any goal of enforcing federal securities law. No potential perpetrator is deterred by the existence of contribution rights. In fact, contribution impairs private enforcement of securities law by making securities litigation excessively complex and expensive. Contribution also makes securities actions unjustifiably difficult to settle, impairing both the victims' recovery and the courts' ability to manage the litigation. Their recognition of contribution rights has caused lower federal courts to develop a secondary jurisprudence of settlement bars and offsets, resulting in unresolved conflicts among the Courts of Appeals. Most probably, a rule of no contribution would be the most effective deterrent of violation of securities laws. Although supporters of contribution inevitably argue it is justified by "fairness," in complex securities litigation, fairness in principle embodies numerous factors which contribution frustrates, and fairness in practice is excessively difficult and expensive to ascertain.

ARGUMENT

"The question of the existence of a statutory cause of action is, of course, one of statutory construction." *Touche Ross*, 442 U.S. at 568 (citations omitted). This principle applies to causes of action for contribution, at least as much as it does to other causes of action. Thus the usual

way a right of contribution may arise is through the affirmative creation of a right of action by Congress, either expressly or by *clear* implication. *Texas Industries*, 451 U.S. at 638; *see Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77 (1981). These carefully circumscribed limits reflect, at bottom, a fundamental tenet of the separation-of-powers doctrine: "federal courts, unlike their state counterparts, are courts of limited jurisdiction." *Id.* at 95.

In this case, there is no support for the suggestion that Congress "affirmative[ly] create[d]" a right of action for contribution under § 10(b). The traditional means for identifying such congressional intent – language of the statute in question and, where that is ambiguous, the legislative history – are silent on the issue. That will, of course, be the situation for virtually every private claim implied before *Touche Ross*, when the federal courts were liberally implying causes of action as a policy matter rather than as a matter of statutory construction. *See Cannon v. University of Chicago*, 441 U.S. 677, 739-747 (1979) (Powell, J., dissenting) (citing numerous cases). There is no reason to foster another round of policy-based litigation about whether a right to contribution exists under each of those previously implied rights of action. *See Touche Ross*, 442 U.S. at 571 ("implying a private right of action on the basis of congressional silence is a hazardous exercise at best").

Nor is this an area where it makes sense to try to divine what Congress would have intended had it known that the federal courts would imply a right of action under § 10(b). While imputing congressional intent may be necessary when "fleshing out" an already established

implied right (*see Lampf Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, No. 90-333, slip op., 115 L.Ed.2d 321 (U.S. June 20, 1991) (statute of limitations under § 10(b))), the creation of a separate right of contribution involves far more than "fleshing out": it extends the power of the federal courts to disputes involving both claims and parties that, but for the implied action for contribution, would simply not be in federal court. That kind of extension directly implicates separation-of-powers concerns. *See Franklin v. Gwinnett Country Public Schools*, No. 90-918, slip op. at 8-9 n.6, 117 L.Ed.2d 208, 219 n.6 (U.S. Feb. 26, 1992) (distinguishing standard for implying *rights* of action, including contribution, from standard for implying *remedies* in the face of congressional silence once a right of action has been established). In any event, the evidence available to impute an intent to Congress leads to one of two inferences: either no congressional preference for contribution in § 10(b) can be imputed or Congress did not intend to create any such private right of action.

I.

FEDERAL COURTS MAY NOT IMPLY A RIGHT OF CONTRIBUTION IN SECTION 10(b)

A. The Court Rightly Disfavors Implied Rights Of Action.

In the structure of Constitutional democracy, the Court is "not at liberty to legislate." *Touche Ross*, 442 U.S. at 579. When Congress intends to grant the right to sue for damages for violation of a statute, normally it must provide the right expressly. *Id.* "[F]ederal courts, unlike

their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc.*, 451 U.S. at 95.

The Court's understanding of the role of the judicial branch in fashioning private rights has evolved through the last 30 years. Increasingly, the Court has recognized the duty of federal courts to operate strictly within the intent of Congress.

In *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), the Court recognized an implied right of action for breach of § 14(a) of the 1934 Act, 15 U.S.C. § 78n(a) (1988). The Court relied primarily upon the remedial purposes of the 1934 Act and the exclusive grant of federal jurisdiction under § 27 of the 1934 Act (15 U.S.C. § 78aa). *Id.* at 433. In effect, the Court supplied a remedy it believed Congress would have enacted if Congress had considered the issue. *Id.* at 434.

Eleven years later, the Court addressed the burgeoning jurisprudence of implied rights by announcing a four-factor test. *Cort v. Ash*, 422 U.S. 66, 78 (1975). The Court held the relevant factors in determining "whether a private remedy is implicit in a statute" are: (1) whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted;" (2) whether there is indication of legislative intent to create or deny a remedy; (3) whether a private remedy is consistent with the "underlying purposes of the legislative scheme;" and (4) whether the cause of action is one traditionally relegated to state law. *Id.* (emphasis in original) (internal quotations deleted). Because the Court relied on many grounds to hold that no

cause of action could be implied in 18 U.S.C. § 610, it did not discuss the weight given to each of the four factors.

In seven decisions, all within five years of *Cort*, the Court restricted the *Cort* analysis to the single question whether Congress intended to create a private right of action. *Transamerica Mortgage Advisors, Inc.*, 444 U.S. at 15-16; *Touche Ross*, 442 U.S. at 568, 575-576; *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 771-772 (1981); *Northwest Airlines*, 451 U.S. at 91; *California v. Sierra Club*, 451 U.S. 287, 297 (1981); *Texas Industries, Inc.*, 451 U.S. at 639-640. In *Touche Ross*, 442 U.S. at 575-576, the Court collapsed the first three *Cort* factors into the single inquiry of Congress' intent and ignored the fourth factor. In *Transamerica*, the Court confirmed that fidelity to Congress' intent was a carefully chosen and lasting approach to implication of private rights of action. *Transamerica Mortgage Advisors, Inc.*, 444 U.S. at 23-24.[4]

Although the Court has never eliminated the *Borak* cause of action, it has emphasized that it has discarded the *Borak* approach to implication of private rights of action. *Transamerica Mortgage Advisors, Inc.*, 444 U.S. at 15-16; *Touche Ross*, 442 U.S. at 578.

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[4] In a case rejecting implication of a private right in 28 U.S.C. § 1738A, the Court's analysis suggested the possibility of a revival of *Cort*, provoking concurring opinions objecting to the argumentation of the unanimous result. *Thompson v. Thompson*, 484 U.S. 174 (1988). Referring later to *Thompson* as applying the exclusive legislative intent test, the Court brought it back into the fold. *Bowen v. Massachusetts*, 487 U.S. 879, 907 (1988); *Karahalios v. Federal Employees*, 489 U.S. 527, 532-533 (1989).

B. The Court Should Be Specially Cautious Of Any Request To Imply A Right Of Contribution.

In its decisions describing the tests for implying private civil causes of action, the Court used but once the phrase "clear implication." The Court said a right to contribution may arise "through the affirmative creation of a right of action by Congress, either expressly or by clear implication. . . . " *Texas Industries, Inc.*, 451 U.S. at 638. *Texas Industries* unanimously held that a right to contribution may not be implied in federal antitrust law.

The Court wisely required specially powerful evidence of Congress' intent because contribution is a right of a wrongdoer, and Congress rarely enacts statutes for the benefit of wrongdoers. Contribution is a claim by a wrongdoer against an alleged or actual wrongdoer to compel sharing in the wrongdoer's liability to the victim of the tort; it is not generally recognized in American common law, and even common law courts normally refrain from creating contribution rights without statutory authority.[5] Implication of a right of contribution

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[5] See Restatement (Second) of Torts § 886A (1979); regarding procedural schemes, please see *Id.*, comment i. The Court explained the history of contribution in a succinct manner appropriate now as background in this case.

> The common law provided no right to contribution among joint tortfeasors. In part, at least, this common-law rule rested on the idea that when several tortfeasors have caused damage, the law should not lend its aid to have one tortfeasor compel others to share in the sanctions imposed by way of damages intended to compensate the victim. Since the turn of the century, however, 39 states and the District of Columbia have fashioned rules of contribution in one form or another, 10 initially through judicial action and the remainder through legislation.

Texas Industries, Inc., 451 U.S. at 634 (citations omitted).

would extend federal jurisdiction into adjudication of disputes among new parties relating to issues that do not involve the rights of the persons Congress intended to benefit by the statute in question.[6]

C. Implication Of A Right Of Action For Persons Injured By Congressionally Condemned Conduct Does Not Suggest Contribution Should Be Implied Among Perpetrators.

Respondents admit their subrogors violated § 10(b) and Rule 10b-5, thereby causing damages to purchasers of Cousins' stock. (J.A. 16, ¶ 26.) Private actions under § 10(b) are, themselves, based on an implied remedy.

Section 10(b) claims have a pedigree distinct from the few implied civil causes of action recognized by the Court on the basis of Congress' intent. The Court has never inquired whether Congress intended to create a private right of action under § 10(b). Rather, the Court "simply explicitly acquiesced in the 25-year-old acceptance by the lower federal courts of an implied action

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[6] Last Term, by citing *Texas Industries* and *Northwest Airlines* as exemplars of the strict tests applied to requests to imply private remedies in silent statutes, the Court reconfirmed that implying a right of contribution is viewed at least as skeptically as implying a private right of action for persons injured by violation of a federal statute. *Franklin*, No. 90-918, slip op. at 8-9 n.6, 117 L.Ed.2d at 219 n.6.

under § 10(b)." *Touche Ross*, 442 U.S. at 577 n.19; *see Superintendent of Insurance v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971).[7]

Once the Court acknowledged the existence of a private right under § 10(b), it faced an inevitable task of fleshing out the contours of the claim. Thus, the Court has defined: the class of persons entitled to assert a claim under § 10(b);[8] the standard of conduct an investor must show to establish a claim;[9] the nature of wrongful acts and the element of cause;[10] the investor's standard of proof;[11] the remedies and measures of damages;[12] and the applicable statute of limitations.[13] As is readily apparent,

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[7] Petitioners do not invite reconsideration of investors' rights to sue for damages. When Congress enacted § 20A of the 1934 Act (15 U.S.C. § 78t-1) in 1988, providing an express remedy for losses caused by insider trading, and § 27A of the 1934 Act (15 U.S.C. § 78aa-1) in 1991, stating the statute of limitations for § 10(b) actions, it explicitly recognized the investor claims created or acquiesced in by this Court.

[8] *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), *reh'g denied*, 423 U.S. 864 (1975).

[9] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), *reh'g denied*, 425 U.S. 986 (1976).

[10] *Superintendent of Insurance*, 404 U.S. at 13 n.9; *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), *reh'g denied*, 407 U.S. 916 (1972), *reh'g denied*, 408 U.S. 931 (1972); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977); *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

[11] *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983).

[12] *Affiliated Ute Citizens*, 406 U.S. at 155; *Randall v. Loftsgaarden*, 478 U.S. 647, 663 (1986).

[13] *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, No. 90-333, slip op., 115 L.Ed.2d 321.

the issue in this case bears no resemblance to the issues decided in any of the "fleshing out" cases. A right of contribution is neither an elaboration nor even an extension of a private right implied for an investor who has suffered loss as a result of violation of § 10(b). Indeed, it is the creation of a claim most jurisdictions do not recognize in the absence of an explicit statute.

The genesis of § 10(b) actions in judicial legislation does not justify further judicial legislation. Even if contribution were an extension of investors' rights under § 10(b), two lines of this Court's jurisprudence would require the extension to be as grounded in Congress' intent as a new cause of action.

First, the Court has used the regulatory purposes of Congress to limit the judicially created private right of action in § 10(b). *Blue Chip Stamps*, 421 U.S. at 729-730. The Court has limited persons entitled to the implied remedy to purchasers and sellers who were the intended beneficiaries of regulation. *Blue Chip Stamps*, 421 U.S. at 732-736, 749. Following Congress' intent, the Court subjected to liability only those persons guilty of scienter. *Ernst & Ernst*, 425 U.S. at 197, 214. Although the Court has been forced to use "policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance,"[14] the Court has never relied on policy to extend the scope of § 10(b) actions or to create new actions. Further, the

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[14] *Blue Chip Stamps*, 421 U.S. at 737.

Court rejects policy arguments as a basis to imply a right of contribution. *Texas Industries, Inc.*, 451 U.S. at 646-647.

Second, where the Court previously recognized an implied right of action before *Transamerica* and *Touche Ross*, any attempt to extend its scope (i.e., the persons or conduct covered) will be subjected to rigorous analysis under the correct standard. Thus, when invited to extend the *Borak* cause of action for misleading proxy disclosure, the Court reaffirmed and applied the *Touche Ross* analysis. *Virginia Bankshares, Inc.*, No. 89-1448, slip op. at 17; 115 L.Ed.2d at 951. In *Virginia Bankshares*, the Court wrote:

> The rule that has emerged in the years since Borak and Mills came down is that recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy. . . . From this the corollary follows that the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended.

Id. at 17, 115 L.Ed.2d at 951 (citation omitted). When asked to supply or extend any civil claim omitted by Congress, the Court must use caution, lest its beneficence frustrate national policy. To illustrate, the Court has cited evidence that the implication of a private remedy in § 10(b) has frustrated the Commission's efforts to extend the scope of regulation to incomplete attempts to commit fraud. *Blue Chip Stamps*, 421 U.S. at 722.

In summary, the Court has approached the implication of any right of contribution with extreme caution, and it should continue to do so. When a party claims an implied right of contribution, irrespective of whether the

party's liability arose from an express victim's right of action or an implied victim's right of action, the question is whether Congress *clearly* implied such a right. Whether to imply a right of contribution is a question distinct from any question regarding how to flesh out an implied right of action for an injured person, and even if implication of a right of contribution were not distinct from the fleshing out process it must be considered under the same tests for implication of an entirely new cause of action.

D. Congress Did Not Imply A Right Of Contribution In § 10(b).

1. Section 10(b) Contains No Language Suggesting That Congress Intended To Benefit Wrongdoers Through A Right of Contribution.

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps*, 421 U.S. at 756 (Powell, J. concurring) (quoted in *Ernst & Ernst*, 425 U.S. at 197). Section 10, in full, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –
>
> (a) . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may

> prescribe as necessary or appropriate in the public interest or for the protection of investors.

The language of § 10 shows Congress intended directly to protect investors from deceptive schemes and indirectly to protect the public by assuring the integrity of securities exchanges. Nothing in § 10 suggests it was adopted to benefit any of the participants in a manipulative or deceptive scheme or device. Respondents are members "of the class whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class. . . ." *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 37 (1977), *reh'g denied*, 430 U.S. 976 (1977). Principled inquiry into Congressional intent could stop here. *See, Texas Industries, Inc.*, 451 U.S. at 639-640.

2. *Evidence Of Congress' Intent Fails To Support Implication Of A Right Of Contribution In § 10(b)*

Any further inquiry into congressional intent must begin with two irrefutable points of history. First, in 1933 and 1934, Congress knew courts would not recognize any right of contribution unless Congress explicitly enacted it.

> The rule which, except as modified by statute, is accepted law in every common-law jurisdiction [but four] is that there can be no contribution between joint tortfeasors, irrespective of whether the claimant is in moral or social fault, as where he is conscious of the wrongfulness of his conduct, or is merely a tortfeasor in the sense that for one reason or another he is liable in an action in form of tort.

Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 Cornell L.Q. 552 (1936). Second, Congress knew "how to define a right to contribution. . . ." *Texas Industries, Inc.*, 451 U.S. at 640 n.11.

Some sections of the 1933 and 1934 Acts create express private rights of action and provide for contribution among persons jointly liable. No legislative history exists to suggest Congress meant those express contribution rights to be applied to other sections of the 1933 and 1934 Acts in which it created a private right of action and did not provide for contribution. *See*, Douglas and Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 178-181 (1933) (legislative history of contribution in § 11(f) of the 1933 Act); H.R. Rep. No. 85, 73d Cong. 1st Sess. 23 (1933) (no reason stated for granting contribution in § 11 of the 1933 Act); H.R. Rep. No. 1383, 73d Cong. 2d Sess. 21, 25 (1934) (no reason stated for granting contribution in what became §§ 9 and 18 of the 1934 Act); S. Rep. No. 792, 73d Cong., 2d Sess. 13, 18, 21 (1934) (same). The Court has commented that neither Congress in adopting § 10(b) nor the Commission in adopting Rule 10b-5 considered the potential existence of private civil remedies. *Blue Chip Stamps*, 421 U.S. at 729-730. This legislative history fails to approach the *Texas Industries* standard of "affirmative creation of a right of action by Congress . . . by clear implication. . . ." *Texas Instruments, Inc.*, 442 U.S. at 638.

Analogy to security for costs provisions illustrates why the Court should not imply a right of contribution in § 10(b). The same sections of the 1933 and 1934 Acts which provide for both a civil remedy and contribution also create procedures for defendants to obtain security for their potential costs of defending a suit; so, too, does

one section which creates a civil remedy without providing for contribution. Securities Act § 11(e) (15 U.S.C. § 77k(e)); Securities Act § 12 (15 U.S.C. § 77l); Securities Exchange Act § 9(e) (15 U.S.C. § 78i(e)); Securities Exchange Act § 18(a) (15 U.S.C. § 78r(a)). In contrast to the absence of a record of Congress' reasons for granting contribution to some securities defendants, Congress made a clear record that it added security for costs provisions to provide "a defense against blackmail suits. . . ." H.R. Rep. No. 1838, 73d Cong. 2d Sess. 41-42 (1934) (amendment to § 11 of the 1933 Act). The security for costs provisions in the 1934 Act were intended to be checks on " 'strike' suits or litigation brought in bad faith. . . ." S. Rep. No. 792, 73d Cong. 2d Sess. 18, 21 (1934) (1934 Act §§ 9, 18). Courts early and decisively discarded the notion of implying a cost bond procedure in § 10(b). *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 788-789 (2d Cir. 1951); *McClure v. Borne Chemical Co.*, 292 F.2d 824, 836-837 (3d Cir. 1961), *cert. denied*, 368 U.S. 939 (1961). The court in *McClure* found that the existence of two private remedy statutes which did not provide for security bonds made Congress' intent too obscure for federal courts to arrogate the power to require bonds in § 10(b) actions. *McClure*, 292 F.2d at 835-836. The clear record of Congress' intent has never been enough to imply a security procedure in § 10(b); *a fortiori*, the weaker record cannot be the basis to imply a cause of action for contribution.

Searching for secondary evidence of Congress' intent reveals a fundamental flaw in Respondents' prayer for a right to contribution. Where, as here, Congress left no record that it anticipated implication of a private right of

action for victims, one can hardly expect a record of congressional thoughts about contribution among perpetrators. Respondents must ask the Court to divine what Congress *would have intended* if it had anticipated the implication of a private remedy for victims of fraud. Such an inquiry is a necessary evil when the Court must flesh out the body of the victim's remedy,[15] but it is an entirely unnecessary evil when a new class of supplicants seeks recognition of a new cause of action.

If the Court searches for what Congress would have intended, history suggests Congress would not have wanted violators of § 10(b) to have rights of contribution. Congress knew it was adopting a "catchall" clause to prevent the development of manipulative or cunning devices not specifically condemned by other parts of the 1934 Act. *Ernst & Ernst*, 425 U.S. at 201-205. By itself, § 10(b) prohibits nothing; it forbids only violation of Securities and Exchange Commission rules. It had no content until the Commission promulgated Rule X-10B-5. *Exchange Act Release No. 3230 (May 21, 1942).*[16] In issuing Rule X-10B-5, the Commission neither considered whether Congress had intended a civil remedy for violation of § 10(b) nor whether the rule would create a civil remedy. *Conference on Codification of the Federal Securities Laws*, 22 Bus. Law. 793, 922 (1967) (comments of Milton Freeman). There is substantial historical evidence that

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[15] *Blue Chip Stamps*, 421 U.S. at 737.

[16] Thus, the first case to imply a private right of action in § 10(b) relied for the content of prohibited conduct on Rule X-10B-5. *Kardon v. National Gypsum Co.*, 69 F.Supp. 512 (E.D. Pa. 1946).

Congress conceived § 10(b) entirely as a delegation of regulatory power to the newly created Commission. *See*, Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 Stan. L. Rev. 385, 460-461 (1990). The implication of investors' remedies may have constrained the intended scope of regulation (see *ante* p. 18). If the regulatory understanding of Congress' intent is correct, even the implication of a remedy for victims of fraud went too far, and the Court certainly should not imply more remedies.

Alternatively, members of the 73d Congress may have considered the prevailing standard for implying private rights of action: where "the disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied." *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916). If so, it is plausible they anticipated the implication of a remedy for victims of violations of § 10(b) and permitted judicial development of that remedy in conscious reliance on the rule that contribution was not available, especially to persons who acted with scienter.

3. *Textual Analysis Of The 1933 And 1934 Acts Does Not Support Imputation Of Congressional Intent To Grant Contribution Rights Under § 10(b).*

Even if it were appropriate to look at other federal securities laws to attempt to impute intent to Congress, comprehensive analysis of those statutes refutes any

attempt to find "clear implication" of a right of contribution in § 10(b). Some courts and commentators have cited selected sections of federal securities laws providing express private rights of action to justify implication of a right of contribution in § 10(b).[17] To the contrary, a review of the seven sections of the 1933 Act and the original 1934 Act which expressly create private remedies demonstrates Congress had no general intention to grant contribution rights to joint wrongdoers. This review is reinforced by considering a new private right of action created in 1988.

The Court recognizes that the 1933 and 1934 Acts must be analyzed as a whole, not separately. "The 1933

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[17] *Heizer Corp. v. Ross*, 601 F.2d 330, 332 (7th Cir. 1979), *criticized, King v. Gibbs*, 876 F.2d 1275 (7th Cir. 1989); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 537 (5th Cir. 1981), *aff'd in part, rev'd in part, without considering contribution*, 459 U.S. 375 (1983); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566 (2d Cir. 1982), *cert. denied*, 459 U.S. 838 (1982), *cert. denied*, 459 U.S. 908 (1982); *deHaas v. Empire Petroleum Co.*, 286 F.Supp. 809 (D. Colo. 1968), *aff'd in part, rev'd in part*, 435 F.2d 1223 (10th Cir. 1970); *Globus, Inc. v. Law Research Service, Inc.*, 318 F.Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir. 1971), *cert. denied*, 404 U.S. 941 (1971); *Baker v. BP America, Inc.*, 749 F.Supp. 840, 842-844 (N.D. Ohio 1990); David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification and Contribution*, 120 U. Pa. L. Rev. 589, 650 (1972); Loss, *Securities Regulation*, 1739-1740 n.178 (1961); *but see, Chutich*, 960 F.2d 721; Mark J. Loewenstein, *Implied Contribution under the Securities Laws: A Reassessment*, 1982 Duke L.J. 543, 554-555 ("Thus, the analogy rationale is not a sound basis for permitting contribution in Rule 10b-5 cases."); *but cf.* M. Patricia Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 Iowa L. Rev. 533, 539 (1981) (statutory interpretation not conclusive.)

and 1934 Acts constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst*, 425 U.S. at 206.

In § 11(f) of the 1933 Act (15 U.S.C. § 77k(f)), Congress granted a right of contribution to some but not all wrongdoers. Simultaneously, in § 12 of the Act (15 U.S.C. § 77l), Congress omitted contribution. Multiple parties may be liable under § 12 for selling an unregistered security or selling a security by means of a communication containing an untrue statement of material fact or omitting to state a material fact. *Pinter v. Dahl*, 486 U.S. 622, 641-654 (1988) (§ 12(1)); *Ryder Int'l Corp. v. First American Nat'l Bank*, 943 F.2d 1521 (11th Cir. 1991) (§ 12(2)).

In § 15 of the 1933 Act (15 U.S.C. § 77o), Congress provided that "control persons" are liable jointly and severally with persons who they control and who are liable under any section of the 1933 Act. Congress did not provide for contribution. Even assuming that a control person could have contribution in a § 11 case, by omitting contribution from both § 12 and § 15, Congress precluded contribution for control persons of persons liable under § 12.

Congress again both granted and omitted contribution in the 1934 Act. Under § 9 (15 U.S.C. § 78i), which imposes liability for willful participation in market manipulations, and § 18 (15 U.S.C. § 78r), which imposes liability on persons who with less than good faith file false or misleading documents with the SEC, contribution is available. Congress omitted contribution under § 16 (15 U.S.C. § 78p), which recaptures short swing profits by

persons likely to have inside information irrespective of the trader's state of mind. Section 16 may trigger multiple liability of co-owners of the security traded, and a short swing seller may be an entity with numerous control persons. *See Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418 (1972). Again, in § 20 (15 U.S.C. § 78t), Congress made control persons jointly and severally liable with persons they control, but granted no rights of contribution. And again assuming control persons have contribution rights under the primarily violated section, Congress did not provide contribution for some control persons, those who suffer § 16 liability.

In 1988, Congress re-expressed its highly selective intentions in providing and omitting contribution rights for violators of securities law. Congress enacted § 20A of the 1934 Act (15 U.S.C. § 78t-1), making any person who purchases or sells a security while in possession of material non-public information liable to the entire class of persons who purchased or sold simultaneously. § 20A(a). Congress specifically provided that any person who communicates material nonpublic information shall be liable jointly and severally with and to the same extent as the trader. § 20A(c). But Congress enacted no right of contribution. Congress' later action offers valuable insight regarding its intent in enacting an earlier statute. *Blue Chip Stamps*, 421 U.S. at 722.[18]

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[18] In *Lampf, Pleva, Lipkind, Prupis & Petigrow*, No. 90-333, slip op., 115 L.Ed.2d 321, the Court declined to apply the statute of limitations of § 20A to actions under § 10(b). A vast gulf exists between the analytical context of this case and that of *Lampf, Pleva*. First, *Lampf, Pleva* involved fleshing out the investor's implied cause of action with a statute of limitations, something

Taking the 1933 Act and the 1934 Act together, it is impossible to conclude Congress intended to grant contribution rights to all persons upon whom civil liability is imposed. Neither did Congress grant contribution to all liable persons who lacked scienter against all persons who had culpable states of mind, nor did Congress grant contribution to all liable persons of equally culpable states of mind. One simply cannot discern a pattern in other statutes which could be imposed on § 10. On this textual record, there is no pattern suggesting Congress would have granted contribution to persons liable under § 10(b) if it had foreseen the investor's implied right of action.

4. *Lower Courts Implying A Right Of Contribution Under § 10(b) Have Relied On Policy Considerations Rejected By This Court.*

Principled analysis should stop in prior sections, with a firm conclusion that the 1933 and 1934 Acts do not supply a "clear implication" of a right to contribution in

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eight members of the Court agreed must exist. Second, the logic and principles of *Lampf, Pleva* differ profoundly from those used to determine whether to imply a private right. In *Lampf, Pleva*, the Court started with policy grounds of national uniformity which self-evidently required a single statute of limitations. *Id.* at 5-6, 115 L.Ed.2d at 331-332. The Court then was forced to choose the best among imperfect analogies to select the specific statute. *Id.* at 10-11, 115 L.Ed.2d at 334-335. Here, the Court's methodology must be to determine Congress' intent, and imperfect analogy is not a proper basis from which to infer Congress meant to create a right of action. *Lampf, Pleva* does not undermine the use of § 20A to illustrate Congress' intent not to create universal contribution rights.

§ 10(b). But something must be said of the courts which have said §§ 9 and 18 of the 1934 Act manifest an intention of Congress to grant contribution generally. At best, those courts have considered §§ 9 and 18 in near or total isolation from the remainder of the 1933 and 1934 Acts.[19] The line of authority supporting contribution was established before *Northwest Airlines* and *Texas Industries*, where this Court demanded a rigorous analysis of Congressional intent.[20] At the core of the authority was a presumption that federal common law applied, and even a *Cort v. Ash* analysis had no bearing on the outcome. *Heizer Corp.*, 601 F.2d at 331, and 333 n.6. At bottom, citation to §§ 9 and 18 has been a makeweight in a jurisprudence founded on the notion that federal courts should append rights of contribution to silent statutes because "the general drift of the law today is toward the allowance of contribution among joint tortfeasors" *Globus, Inc.*, 318 F.Supp. at 957;[21] *see Heizer Corp*, 601 F.2d

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[19] *Heizer Corp.*, 601 F.2d at 332; *deHaas*, 286 F.Supp. at 815; *Globus, Inc.*, 318 F.Supp. at 958; *Baker*, 749 F.Supp. at 842-844.

[20] *Heizer Corp.*, 601 F.2d 330; *Huddleston*, 640 F.2d 534; *deHaas*, 286 F.Supp. 809; *Globus, Inc.*, 318 F.Supp. 955.

[21] The district court in *Globus* erred in describing a trend. Its string citation included only cases involving negligence. See the cases collected at 318 F.Supp 957. The then-newest decision adopting contribution is illustrative of the *Globus* court's misunderstanding; it was a federal appellate decision adopting contribution in a negligence action as a matter of common law without discussion of the source of its authority to make common law. *Gomes v. Brodhurst*, 394 F.2d 465, 467 (3d Cir. 1967). No trend existed to grant contribution to persons who acted with scienter. *See* Restatement (Second) of Torts § 886A(3) and comment j thereto.

at 332. This is exactly the sort of legislative consideration the Court forbids in implied rights analysis. *Touche Ross*, 442 U.S. at 579.

Courts recognizing a right of contribution in § 10(b) actions after *Texas Industries* divide in two lines of error. Some have paid absolutely no attention to *Texas Industries*, woodenly following earlier cases without analysis of judicial power.[22] Others presume a license to create new implied claims because the victim's § 10(b) claim is implied rather than express[23] (of course, if this license ever existed, it was revoked in *Virginia Bankshares*, see *ante*, p. 18).

The line of authority rejecting implication of a security for costs procedure (see *ante* pp. 21-22) demonstrates that courts implying a right to contribution in § 10 drifted away from the moorings of federal jurisprudence when they followed a perceived trend in tort law. In principle, implying a security for costs procedure in § 10 had more claim to judicial consideration than did implying a right

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[22] E.g. *Smith*, 827 F.2d at 560; *Sirota*, 673 F.2d at 578; *In re Nat'l Student Mktg. Litig.*, 517 F.Supp. 1345, 1348-1349 (D.D.C. 1981) (ignoring the rationale of *Texas Industries* and inferring the old line of authority was valid because the Court denied certiorari in one case); *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880, 885-886 (D.N.J. 1984) (relying on the previous citation).

[23] *In re Olympia Brewing Co. Sec. Litig.*, 674 F.Supp. 597, 615-616 (N.D. Ill. 1987); *Alvarado Partners, L.P. v. Mehta*, 723 F.Supp. 540, 549 (D. Colo. 1989), *appeal dismissed*, 936 F.2d 582 (10th Cir. 1991); *Baker*, 749 F.Supp. at 844.

of contribution. At least security for costs could be argued to be part of fleshing out a recognized implied right of action rather than a new cause of action, and Congress would have had as much reason to fear abusive litigation under § 10(b) of the 1934 Act as under §§ 11 and 12 of the 1933 Act and §§ 9 and 18 of the 1934 Act. By failing to recognize that the principles of the *Fischman* and *McClure* decisions foreclosed creating an implied right of contribution based on artificial analogy to §§ 9 and 18 of the 1934 Act, courts creating the implied right exposed the unprincipled ground of their decisions.[24]

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[24] Lower courts' erroneous implication of a right of contribution in § 10(b) approaches uniqueness in federal jurisprudence. Courts have refused to imply a right of contribution in the following federal statutes:

Commodities Exchange Act – *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 27-28 (1st Cir. 1990)

False Claims Act – *Mortgages, Inc. v. United States District Court*, 934 F.2d 209, 213 (9th Cir. 1991)

Federal Employees' Compensation Act – *Green v. United States Dept. of Labor*, 775 F.2d 964, 971 (8th Cir. 1985)

Lanham Act – *Getty Petroleum Corp. v. Island Transp. Corp.*, 862 F.2d 10, 16 (2d Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989)

Securities Act, § 12(2) – *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1102-1104 (4th Cir. 1989) (*en banc*)

Courts that have taken the time to apply *Texas Industries* to § 10(b) have held there is no right of contribution. *Chutich*, 960 F.2d 721; *In re Professional Fin. Management, Ltd.*, 683 F.Supp. 1283, 1285-87 (D. Minn. 1988); *Nelsen v. Craig-Hallum, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) 94,500 at 93192-93193 (D. Minn. 1989); *Robin v. Doctors Officenters Corp.*, 730 F.Supp. 122, 124-25 (N.D. Ill. 1989); *Biben v. Card*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,512 at 92,331 n.2 (W.D. Mo. 1991); *see Baker, Watts & Co.*, 876 F.2d at 1102-04 (holding no right to contribution may be implied in section 12(2) of the Securities Act of 1933); *King*, 876 F.2d 1275 (§ 10(b), dictum).

II.

FEDERAL COMMON LAW CANNOT SUPPLY ANY BASIS TO GRANT CONTRIBUTION TO A PERSON HELD LIABLE UNDER § 10(b)

There is no general federal common law right to contribution. *Northwest Airlines, Inc.*, 451 U.S. at 96. The Court may, however, create a right to contribution where federal common law applies. *Texas Industries, Inc.*, 451 U.S. at 641-642. We will show federal common law does not apply to actions under section 10(b), and if federal

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Racketeering Influenced and Corrupt Organizations Act – *Friedman v. Hartman*, 787 F.Supp. 411, 415-418 (S.D.N.Y. 1992)
See also, Levit v. Ingersoll Rand Fin. Corp., 874 F.2d 1186, 1191 (7th Cir. 1989) (Internal Revenue Code § 6672(a)).

common law did apply the Court should not create a right to contribution.

A. Federal Common Law Does Not Permit Creation Of A Right To Contribution Under Section 10(b).

The Court has narrowly defined the scope of federal common law:

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.

Texas Industries, Inc., 451 U.S. at 641 (footnotes omitted). Obviously this is not an admiralty case.

1. The Rights And Obligations Of The United States Are Not Involved.

The Court held that contribution among antitrust wrongdoers does not "implicate 'uniquely federal interests' of the kind that oblige courts to formulate federal common law." *Id.* at 642. The Court held contribution in the antitrust context did "not involve the duties of the Federal Government, the distribtution of powers in our federal system, or matters necessarily subject to federal control even in the absence of statutory authority." *Id.*

No meaningful distinction can be made between civil antitrust law and civil securities law. Both the antitrust statutes and the 1933[25] and 1934[26] Acts were enacted pursuant to the power of Congress under the Commerce Clause, art. I, § 8, cl. 3, of the Constitution. Both *Texas Industries* and this case involve wholly private claims in which the only federal interest is that the vindication of private rights arising out of the statutes "supplements federal enforcement and fulfills the objects of the statutory scheme." *Texas Industries, Inc.*, 451 U.S. at 642. Civil actions under the 1933 and 1934 Acts do not implicate uniquely federal interests of the kind that oblige courts to formulate federal common law.

2. *Congress Has Not Vested Jurisdiction In The Courts To Develop A Common Law Of Securities Regulation.*

In *Texas Industries*, the Court observed that Congress' intent was unmistakably clear "to allow courts to develop governing principles of law . . . with regard to substantive [antitrust] violations. . . ." *Id.* at 643. Nevertheless, the Court held that Congress did not manifest a similar intent to vest courts with discretion to create remedies. *Id.* at 645-646.

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[25] *Coplin v. United States*, 88 F.2d 652, 656-657 (9th Cir. 1937), *cert. denied*, 301 U.S. 703 (1937).

[26] *Wright v. Securities and Exchange Comm'n*, 112 F.2d 89, 94 (2d Cir. 1940); *Smolowe v. Delendo Corp.*, 136 F.2d 231, 240 (2d Cir. 1943), *cert. denied*, 320 U.S. 751 (1943).

Here, as in *Texas Industries* and *Northwest Airlines*, the Court should infer from the comprehensive and integrated regulatory scheme that Congress did not intend to vest courts with the discretion to fashion claims like contribution as a matter of common law. *Id.*; *Northwest Airlines, Inc.*, 451 U.S. at 97. The 1933 and 1934 Acts, taken together, are as sophisticated, integrated and comprehensive as any federal regulatory scheme imaginable.[27]

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[27] Each Act contains comprehensive definitions to describe what is regulated. Securities Act § 2, 15 U.S.C. § 77b; Securities Exchange Act § 3 (15 U.S.C. § 78c). Congress created the Commission to execute the Acts. Securities Exchange Act § 4 (15 U.S.C. § 78d). The Acts begin with sweeping prohibitions, enforced by criminal penalties, forcing all securities offerings through a registration scheme. Securities Act §§ 5, 20 and 24 (15 U.S.C. §§ 77e, 77t and 77x). The Acts create a comprehensive registration and reporting scheme for all securities offered or traded in interstate commerce and delegate to the Commission, not the courts, the power to formulate the substance of federal securities regulation. Securities Act §§ 6, 7, 8, 10, 19 and Schedules A and B (15 U.S.C. §§ 77f, 77g, 77h, 77j, 77s and 77aa); Securities Exchange Act § 12, 13 and 23 (15 U.S.C. §§ 78l, 78m and 78w). The 1934 Act provides for comprehensive regulation of securities exchanges, trading practices, brokers and dealers, again vesting rulemaking power in the Commission rather than the courts. Securities Exchange Act §§ 5, 6, 7, 8, 11, 15, 17 and 19 (15 U.S.C. §§ 78e, 78f, 78g, 78h, 78k, 78o, 78q and 78s). The 1934 Act regulates proxy solicitation (again delegating rulemaking power to the Commission) and trading by corporate insiders. Securities Exchange Act §§ 14 and 16 (15 U.S.C. §§ 78n and 78p). The Acts impose specific civil and criminal penalties for violations of the registration and reporting rules. Securities Act §§ 11, 12 and 20 (15 U.S.C. §§ 77k, 77l and 77t); Securities Exchange Act §§ 18 and 32 (15 U.S.C. §§ 78r and 78ff). The Acts impose criminal liability for fraud. Securities Act § 17 (15 U.S.C. § 77q); Securities Exchange Act § 32 (15 U.S.C. § 78ff). The Acts grant the Commission broad enforcement powers. Securities Act § 20

To its comprehensive legislation, Congress added section 10(b) "as a 'catchall' clause to enable *the Commission* 'to deal with new manipulative [or cunning] devices.' " *Ernst & Ernst*, 425 U.S. at 203 (emphasis supplied). This Court has never taken the "catchall" section 10(b) as a grant of broad power to federal courts to formulate remedies which Congress did not enact. *Ernst & Ernst* illustrates the Court's dedication to a § 10(b) jurisprudence grounded in statutory construction rather than federal common law. *See ante*, pp. 16-17; *Santa Fe Industries*, 430 U.S. at 472 (Congress did not mean to sweep breach of fiduciary duty into the catchall concept of fraud); *Chiarella v. United States*, 445 U.S. 222, 233-235 (1980) (Congress did not mean to include silence as fraudulent conduct absent a duty to speak).

As in *Texas Industries*, the existence of a right of contribution is a matter for Congress, not the courts to resolve.

> The range of factors to be weighed in deciding whether a right of contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue.

Texas Industries, Inc., 451 U.S. at 646. The Court recited factors "going beyond the record of a single lawsuit" which must be considered in deciding whether to grant a right of contribution. Those same factors exist here.

(15 U.S.C. § 77q); Securities Exchange Act § 21 (15 U.S.C. § 78u). The Acts grant private parties certain specific remedies for fraud and void contract terms contrary to the Acts. Securities Act §§ 11, 12(2) and 14 (15 U.S.C. §§ 77k, 77l and 77h); Securities Exchange Act §§ 9 and 29 (15 U.S.C. §§ 78i and 78cc).

Finally, invocation of joint and several liability, whether in an express or implied cause of action, does not suggest courts may create contribution, "since joint and several liability simply ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants." *Texas Industries, Inc.*, 451 U.S. at 646.

No credible ground exists to create a federal common law cause of action for contribution under section 10(b).

B. If Federal Common Law Power Existed To Create A Right Of Contribution Under § 10(b), The Court Should Not Exercise It.

1. Contribution Fails To Promote Any Federal Enforcement Goal.

Contribution does not promote enforcement of securities laws. Class actions are the primary vehicle for private enforcement of § 10(b). *See*, Loss, *Fundamentals of Securities Law*, 871 n.3 (Little, Brown & Co. 1988); Jacobs, *Litigation and Practice Under Rule 10b-5* § 301.01 at 12-104.7 (Clark Boardman Callaghan 1992). Officers and directors of publicly traded companies, members of the securities industry and other persons who may injure investors by violating section 10(b) may be completely unfamiliar with contribution, but they are acutely aware of class actions. They know that everyone who has potential culpability and either money or insurance is swept into class actions. *If* they believed contribution existed, they could not rationally take it into account in deciding how to act for two

reasons: (1) contribution does not reduce the risk of catastrophic litigation expenses and (2) the benefit of contribution, if any, is completely unpredictable. Creating a right of contribution would therefore add nothing to the regulatory force of federal securities laws.

2. *Contribution Impairs Judicial Management Of Securities Litigation And Thus Impairs Enforcement Of Federal Securities Law.*

Contribution in securities cases results "in additional trial and pretrial proceedings, thus adding new complications to what already is complex litigation." *Texas Industries, Inc.*, 451 U.S. at 638 (antitrust). Defendants in complex securities litigation simply will not settle unless they are assured the settlement terminates entirely their involvement with the litigation. "Anyone foolish enough to settle without barring contribution is courting disaster." *In re Nucorp Energy Securities Litigation*, 661 F.Supp. 1403, 1408 (S.D. Cal. 1987).

Because they have adopted contribution to promote "fairness" in the abstract, courts find themselves obliged to consider how to administer contribution fairly when faced with the concrete facts of a case. Lower federal courts have therefore developed a federal common law of "contribution bars" or "settlement bars." *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 599 (2d Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1228-29 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 232 (1990).

A conflict exists between two inconsistent attempts to achieve fairness. In *Franklin*, the Ninth Circuit imposed

the burden of determining fairness on the jury at trial. Under the *Franklin* rule, the jury must determine the relative fault of the settling defendants and the non-settling defendants; the non-settling defendants then are jointly liable for a percentage of the victims' total damage equal to their share of the relative fault. *Franklin*, 884 F.2d at 1231. In *Singer*, the Second Circuit required district courts to determine in a hearing at the time of the settlement whether the settlement is fair to the non-settling defendants; the amount of the settlement then is to be set off against from the plaintiffs' recovery from the non-settling defendants. *Singer*, 878 F.2d at 600.

Neither approach to settlement bars is satisfactory. The *Franklin* approach has nearly terminated partial set tlements of securities class actions in the Ninth Circuit. *Franklin* intensely motivates non-settling defendants to pursue the "empty chair" defense and ironically forces plaintiffs to defend the cases of the persons with whom the plaintiffs settled. *Franklin* makes it impossible for plaintiffs to settle with highly culpable but financially strapped defendants. Further, *Franklin* burdens juries with extra decisions in cases notorious for their complexity. *Singer* generates additional proceedings in trial courts, additional appeals and attendant risks of error. To illustrate, if a district court's decision to bar contribution rights against a settling defendant is reversed on appeal, the case management consequences are enormous.

The conflict between the circuits regarding bar orders causes confusion and case management problems in the district courts. Indeed, the conflict itself has undone at least one settlement because neither the parties nor the trial judge could determine how to protect the rights of

the non-settling defendants. *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155 (4th Cir. 1991).

3. *On Balance, A Rule Of No Contribution Enhances The Enforcement Of Federal Securities Laws.*

Commentators and economists have argued at length regarding whether contribution or no contribution best serves the enforcement purposes of regulatory and tort law. *See Texas Industries, Inc.*, 451 U.S. at 636-637. The leading authorities argue that no contribution enhances enforcement because contribution is a form of insurance and, at least in the high risk environment of fraud-on-the-market securities litigation, business managers will be risk averse and will be detered from misconduct by the risk of catastrophic loss. Landes & Posner, *The Economic Structure of Tort Law* 203 (1987); R. Posner, *Economic Analysis of Law* 172-173 (3d ed. 1986); Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. Law & Econ. 331, 332, 353 (1980)

4. *Contribution Fails To Promote Fairness.*

Proponents of contribution always claim it promotes fairness between tortfeasors. Perhaps this is so in automobile accident cases, but § 10(b) is not concerned with vehicular traffic.

Fairness to whom? The first object of judicial solicitude should be victims of fraud. The experience of lower

courts' error in permitting contribution shows contribution is unfair to victims of fraud because it adds undue expense to the prosecution of their cases and makes it very difficult to settle if even one defendant insists on trial. The second object of judicial solicitude should be the public, whose judicial resources are unduly taxed by both overly complex actions and extra actions resulting from contribution.

The Court has commented on the minimal value of doing equity for suitors who arrive in court with hands in a "septic state." *Texas Industries, Inc.*, 451 U.S. at 635. Even if federal courts should comfort wrongdoers, the definition of fairness is far from clear. In *Texas Industries*, the Court observed the difficulty apportioning damages among leaders, followers, giants and pygmies. *Id.* at 637. At bottom, the dubious issues of equity between co-violators do not implicate federal enforcement interests.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that the Court reverse the judgment of the Court of Appeals and remand the case to the Court of Appeals with directions (1) to affirm the District Court's dismissal of the first and third claims for relief and (2) to take such action as it determines to be appropriate in light of the Court's decision with respect to the remaining claims for relief.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

MUSICK, PEELER & GARRETT, ET AL., PETITIONERS

v.

EMPLOYERS INSURANCE OF WAUSAU, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether contribution is available to allocate responsibility among defendants in a private damages action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b).

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-34

MUSICK, PEELER & GARRETT, ET AL., PETITIONERS

v.

EMPLOYERS INSURANCE OF WAUSAU, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS PEAT MARWICK MAIN & CO. AND K.M.G. MAIN HURDMAN

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 954 F.2d 575. The memorandum decision and order of the district court (Pet. App. 14-30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1992, and a petition for rehearing was denied on May 28, 1992 (Pet. App. 32). The petition for a writ of certiorari was filed on July 2, 1992, and was granted on October 5, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

The relevant portions of Section 11(f) of the Securities Act of 1933, 15 U.S.C. § 77k(f); Sections 9(e), 10(b), and 18 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78j(b), and 78r; and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, are set forth in the appendix to this brief.

STATEMENT

Respondents Peat Marwick Main & Co. and K.M.G. Main Hurdman (hereinafter "Peat Marwick") are in a somewhat unusual position in this case. Like petitioners, they are defendants in this contribution action and therefore would benefit in this case if the Court were to eliminate contribution with respect to liability under Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b). But, as an accounting firm that provides professional services to a wide range of public companies, Peat Marwick finds itself named as a defendant with some frequency in actions commenced under Section 10(b) after securities issued by one of its clients suffer a sudden decline in value. The claim in those cases—as here—is that financial statements audited by Peat Marwick contained material misstatements or omissions.

In that setting, Peat Marwick often confronts situations in which the complaint names as defendants other persons or entities (such as the issuer of the securities whose purchase or sale is the basis for the Section 10(b) claim, that company's officers and directors, or the company's attorneys and underwriters) that may bear all, or at least a significant amount, of the responsibility for the events underlying the claimed fraud. In order to ensure that it will not be forced to shoulder an unfair share of the responsibility for any settlement payment or damages award, Peat Marwick invokes the contribution right against such parties. Because Peat Marwick views con-

tribution as an essential element of the private action implied under Section 10(b), it submits this brief urging the Court to leave in place the well-settled principle that contribution is available to allocate responsibility in actions under Section 10(b).[1]

1. This case arises out of a class action filed in 1984 in the United States District Court for the Southern District of California by purchasers of securities issued by Cousins Home Furnishings, Inc. The plaintiffs alleged that documents issued in connection with a 1983 public offering of securities by Cousins contained false and misleading statements and that the price of the securities was artificially inflated by those statements and by certain other statements made by Cousins that allegedly were also false and misleading. The complaint asserted violations of Section 10(b) and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5; Section 11 of the Securities Act, 15 U.S.C. § 77k; and state law. Pet. App. 3.

Named as defendants in that action were Cousins, some of Cousins' officers and directors, Cousins' parent corporation, and Cousins' underwriters. The plaintiffs affirmatively decided not to join Cousins' accountants and attorneys. The named defendants eventually settled the case for $13.5 million. The district court approved the settlement, finding that it constituted "'the settling defendants' fair or proper share of the total damages sought by the plaintiffs.'" Pet. App. 3.

Respondents Employers Insurance of Wausau and Federal Insurance Co. were the insurers for the officers and directors who settled in the class action; the two com-

[1] In the court below, Peat Marwick limited its argument to the contention—accepted by the district court (see Pet. App. 18-24)—that contribution was not available to these plaintiffs on the facts of this case. Peat Marwick did not dispute the existence of a contribution right in Section 10(b) actions.

panies paid $13 million of the settlement. The insurers then instituted the present case as subrogees of the settling defendants, seeking contribution and indemnity for the settlement payment. They joined as defendants petitioners and respondent Peat Marwick, all of whom are attorneys or accountants, alleging that they provided professional services to Cousins in connection with the 1983 stock offering. The complaint seeks contribution under Section 10(b), Section 11, and state law. Pet. App. 4, 16-17.

2. The district court dismissed the complaint, holding that contribution was precluded by the prior determination that the settlement amount represented the settling defendants' "fair or proper share of the total damages." Because contribution is available only when a defendant pays more than its share of the liability, and the settling defendants paid only their "fair share" of the damages suffered by the plaintiffs, those defendants were not entitled to obtain contribution from other parties. Pet. App. 19-23.

The court of appeals reversed. It held that the "fair share" determination made in approving the settlement of the class action established that "the total amount of the settlement bore a reasonable relationship to the damage suffered by the plaintiff class, discounting for factors such as the cost and uncertainty involved in litigating the dispute" and that the "amount paid by each individual defendant was 'fair' given their culpability *relative to the other defendants involved in the litigation.*" Pet. App. 7-8 (emphasis in original). But the court found that the "fair share" determination did not address the fairness of the payments by the settling defendants relative to any *nonparties* allegedly responsible for the injury, and therefore provided no basis for dismissing the contribution claim against persons and entities not parties to the original action. *Id.* at 8-9. The court remanded the case for further proceedings on the contribution claim.

INTRODUCTION AND SUMMARY OF ARGUMENT

Contribution is a means of allocating responsibility among jointly liable defendants. "Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 87-88 (1981) (footnote omitted). A defendant who pays more than his share—whether in settlement or pursuant to a judgment on the merits—is entitled to recover the overpayment from other responsible parties. Contribution may provide the basis for a separate action to recover the overpayment, but it probably is most frequently invoked to apportion responsibility among parties in already-existing actions.

The right to allocate responsibility among jointly liable parties through contribution has long been a recognized element of the remedy implied under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). From the first reported decision addressing the question—a 1968 district court ruling upholding contribution—the district courts and courts of appeals were remarkably consistent in permitting contribution until 1988, when a few district courts began to conclude, on the basis of the then seven-year-old decisions in *Northwest Airlines*, *supra*, and *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), that contribution should no longer be allowed. That view was rejected by other district courts, however, and was not adopted by *any* court of appeals until earlier this year. *Chutich* v. *Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992). Contribution has thus been a well-settled—and extremely important—element of the Section 10(b) remedy for over two decades.

Petitioners' argument that contribution should be eliminated from the Section 10(b) action rests on their contention that this Court should define the contours

of the private action implied under Section 10(b) by utilizing the principles set forth in *Northwest Airlines* and *Texas Industries*. Those cases held—in the context of causes of action expressly created by Congress—that contribution is permissible only where specifically authorized by Congress. Because there is no evidence that Congress intended to authorize contribution among defendants held jointly liable under the Section 10(b) implied right of action, petitioners conclude that contribution should not be permitted.

Petitioners' approach is, of course, wholly inapposite in the peculiar context of Section 10(b). This Court has recognized that Section 10(b) was created by the courts, not by Congress. It therefore is "hardly surprising" (*Franklin* v. *Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1035 (1992)) that Congress said nothing about contribution when it wrote the statute. "[T]he usual recourse to statutory text and legislative history * * * necessarily will not enlighten [the Court's] analysis." *Ibid.*

The proper approach for determining the contours of the Section 10(b) remedy is the one that the Court utilized in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), to identify the appropriate statute of limitations for Section 10(b) actions. The Court looked to the limitations period that Congress adopted to govern the analogous express causes of action enacted with Section 10(b). The Court explained that it could "imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections." *Id.* at 2780.

The causes of action that the Court looked to in *Lampf*—Sections 9 and 18 of the Securities Exchange Act, 15 U.S.C. §§ 78i & 78r—both expressly provide for contribution. Although Congress did not authorize contribution in some

other nonanalogous causes of action set forth in the securities laws, the provisions that most closely resemble Section 10(b) all provide for contribution. There can be no doubt that had Congress expressly authorized a private cause of action in Section 10(b), it would have authorized contribution as well.

Petitioners and their amicus argue that various policy considerations weigh against contribution. But Congress evaluated the relevant policies and determined that contribution should be permitted in causes of action closely resembling Section 10(b). Given that clear indication of congressional intent, there is no need for this Court to make an independent policy determination. In any event, considerations of fairness and deterrence, and the need to prevent "strike suits," all support continued recognition of contribution in Section 10(b) actions.

Finally, petitioners contend that the Court may not allow contribution even if it is certain that Congress would have authorized contribution had it known that a private damages action would be implied under Section 10(b). Nothing in this Court's jurisprudence requires that absurd result.

Petitioners' contention is based on the supposed difference between the "task of fleshing out the contours of the [Section 10(b)] claim" (Pet. Br. 16) and recognition of what they assert to be the wholly separate contribution right. But a claim in contribution is not independent of the plaintiff's Section 10(b) action; it is entirely dependent upon and subsidiary to the plaintiff's claim. And contribution does not expand the courts' authority, because contribution may be asserted only against parties who could have been joined as defendants in the first place. There simply is no basis for petitioners' distinction between the contribution issue and the other questions regarding the parameters of the Section 10(b) remedy that have been resolved by this Court.

Even if the question whether to allow contribution were analyzed under the principles the Court uses to decide whether to recognize a wholly independent cause of action, the outcome would not change. Given the longstanding judicial recognition of contribution and Congress's ratification of that settled rule, the contribution right can be upheld on the same basis as the Section 10(b) action itself.

In addition, in the particular circumstances presented here, recourse to federal common law is permissible to allow the Court to complete the judicially created Section 10(b) remedy in a manner that comports with congressional intent. There simply is no reason that the Court should be forced to overturn a settled rule of more than two decades' duration when that result would produce a remedy directly at odds with Congress's design and with fundamental fairness.

ARGUMENT

CONTRIBUTION SHOULD BE PERMITTED AMONG DEFENDANTS IN ACTIONS UNDER SECTION 10(b)

The question presented in the certiorari petition regarding the availability of contribution in private actions under Section 10(b) encompasses two issues. The first issue is whether under the approach this Court has applied in determining the configuration of the Section 10(b) remedy—which looks to what Congress would have done had it known it was creating a private damages remedy—Section 10(b) is appropriately construed to permit defendants to allocate responsibility among themselves through contribution claims. The second issue is whether, assuming Section 10(b) is appropriately construed to authorize contribution, recognition of a contribution right is nonetheless beyond the authority of this Court. Petitioners improperly conflate these inquiries, and in the process completely ignore the methodology that this Court repeatedly has utilized in resolving questions

regarding the Section 10(b) remedy. We address each of these issues in turn.

A. Contribution Is Appropriate In Section 10(b) Actions Because Congress Would Have Expressly Authorized Contribution If It Had Known It Was Creating A Private Damages Action When It Enacted Section 10(b).

Where a cause of action is created by Congress, this Court resolves questions regarding the contours of that cause of action by looking to what Congress intended. See, *e.g.*, *Holmes* v. *Securities Investors Protection Corp.*, 112 S. Ct. 1311, 1317-1318 (1992) (standing to sue under RICO); *Pinter* v. *Dahl*, 486 U.S. 622, 641-654 (1988) (class of defendants subject to liability under Section 12 of Securities Act); *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 152 (1987) (statute of limitations under RICO). The Court has utilized the same approach in answering questions regarding the availability of contribution in express causes of action; they too are decided on the basis of Congress's intent. *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639-640 (1981) (contribution under antitrust laws); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 90-95 (1981) (contribution under Equal Pay Act and Title VII).

Petitioners argue (Br. 19-24) that the same approach should apply to the question presented in this case. Finding no evidence that Congress intended to authorize contribution claims, they conclude that contribution should not be permitted in Section 10(b) actions.

Petitioners' syllogism is entirely inapposite here. This Court "ha[s] made no pretense that it was Congress' design to provide the [private damages] remedy afforded" under Section 10(b). *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773, 2780 (1991). It is therefore "no surprise" (*ibid.*) that Congress did not indicate its view regarding any of the innumerable ques-

tions that must be resolved in order to fix the contours of the cause of action—including, for example, the types of injuries that give rise to a claim for damages; the existence of defenses based upon the fault or misconduct of the plaintiff; the measure of damages; the statute of limitations; and the allocation of damages, such as whether defendants' liability is several or joint and several and, if joint and several, whether contribution among jointly liable defendants is available. Cf. *Franklin* v. *Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1035 (1992) (where the statute "supported no express right of action," and the cause of action was instead judicially created, "it is hardly surprising that Congress also said nothing about the applicable remedies"). The absence of any evidence of congressional intent with respect to these issues is due to the fact that Congress had no reason to consider any of these questions because it did not intend to create a private damages remedy in the first place.

Petitioners "fundamentally misunderstand the nature of the inquiry, therefore, by needlessly dedicating large portions of their brief[] to discussions of how the text and legislative intent behind [Section 10(b)] are 'silent' on" the question of contribution. *Franklin*, 112 S. Ct. at 1035. "Because the cause of action was inferred by the Court * * *, the usual recourse to statutory text and legislative history * * * necessarily will not enlighten [the Court's] analysis." *Ibid.* This Court recognized as much in *Lampf*, observing that it was "faced with the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed." 111 S. Ct. at 2780.[2]

[2] In *Northwest Airlines* and *Texas Industries*, the Court also acknowledged the distinction between congressionally created causes of action and judicially implied ones. It expressly reserved the question whether the standard announced in those cases for determining the availability of contribution in causes of action created by Congress would apply to Section 10(b), observing that the Section 10(b) cause of action was not created by Congress. *Texas Indus.*, 451 U.S. at 640 n.11; *Northwest Airlines*, 451 U.S. at 91-92 n.24. It is remarkable that petitioners rely on these decisions without ever acknowledging the Court's express recognition that a different result might be appropriate for actions under Section 10(b).

Rather than apply a meaningless test, the Court has construed judicially created actions by looking to what Congress would have done had it known that it was creating a private right of action. This approach has the virtue of anchoring these actions as much as possible in congressional determinations, thereby limiting the need for independent policymaking by the Court. Thus, in deciding on the limitations period applicable to Section 10(b) actions, the Court adopted the limitations period that governed analogous causes of action in the same statute. *Lampf*, 111 S. Ct. at 2780. The Court reasoned that it could "imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections." *Ibid.*

Similarly, in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 736 (1975), the Court held that only actual purchasers or sellers of securities could assert damages claims under Section 10(b) because the express causes of action "created by Congress contemporaneously with the passage of § 10(b)" were limited to purchasers and sellers. The Court reasoned that "[i]t would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." *Ibid.*

The inquiry in this case should be the same. To determine whether contribution is available under Section 10(b), the Court should consider how Congress treated contribution in "similar and related" provisions of the securities laws. Under that standard, there can be no

doubt that Section 10(b) should be construed to permit contribution.[3]

1. *Congress Provided For Contribution In The Express Causes Of Action That Are Most Analogous To The Section 10(b) Action.*

This Court already has identified the express causes of action most analogous to the action implied under Section 10(b). In selecting the appropriate statute of limitations for Section 10(b) actions, the Court in *Lampf* looked to Section 9 of the Securities Exchange Act, 15 U.S.C. § 78i, which provides a cause of action for manipulative marketing of securities, and Section 18 of that statute, 15 U.S.C. § 78r, which allows a purchaser of securities to recover for reliance on false and misleading statements in documents filed with the Securities and Exchange Commission. See 111 S. Ct. at 2781. These

[3] Petitioners suggest (Br. 14-15) that the Court somehow has less authority to construe the Section 10(b) remedy in a manner favorable to *defendants*. There is no support whatever for that contention. In *Lampf*, the Court held that plaintiffs' claims were governed by a strict limitations period; under petitioners' approach, the Court should have adopted no limitations period at all. See also *Blue Chip Stamps*, *supra* (restricting class of injured parties entitled to damages under Section 10(b)).

Petitioners also contend (Br. 24) that Congress in 1934 may have "anticipated the implication of a remedy for victims of violations of § 10(b) and permitted judicial development of that remedy in conscious reliance on the rule that contribution was not available." They cite no support for this theory, which is wholly inconsistent with this Court's observation that Congress did not contemplate a private damages action under Section 10(b). Moreover, if petitioners are correct, *Lampf* was wrongly decided: Congress would also have acted "in conscious reliance" on the general rule that, in the absence of an express federal limitations period, courts will apply state statutes of limitation to federal actions. See *Campbell* v. *Haverhill*, 155 U.S. 610, 617 (1895). Of course, *Lampf* rejected that approach, expressly holding that the proper way to ascertain Congress's intent with respect to the contours of the Section 10(b) action is to look to analogous provisions of the federal securities laws.

provisions, the Court reasoned, "target the precise dangers that are the focus of § 10(b)," and, like Section 10(b), each "was intended to facilitate a central goal: 'to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges.'" *Ibid.* (quoting *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195 (1976)).

Section 9 and Section 18 both expressly provide for contribution. See 15 U.S.C. §§ 78i(e) and 78r(b). The reasoning applied by the Court in *Lampf* compels the conclusion that Congress would have permitted contribution in actions under Section 10(b) as well.

The conclusion that Congress would have authorized contribution in Section 10(b) actions rests on more than this Court's determination in *Lampf*, however. Comparing Section 10(b) with these express causes of action, and with Section 11 of the Securities Act, 15 U.S.C. § 77k, which imposes joint and several liability for false statements in a registration statement filed with the Commission and also provides for contribution (*id.* § 77k(f)), reveals a number of close similarities that provide an even greater justification for the inference that Congress would have authorized contribution under Section 10(b).[4]

[4] Petitioners point out (Br. 26) that contribution is not available to all defendants under Section 11: the provision does not allow a party that acted with scienter to obtain contribution from a party that did not. See 15 U.S.C. § 77k(f). A party that acted with scienter may, however, obtain contribution from another party that acted with scienter. *Ibid.* That is all that is relevant here, because proof of scienter is required to impose liability under Section 10(b). Thus, the Section 11 contribution provision would not limit the contribution rights of the class of persons who may be liable under Section 10(b). Sections 9 and 18—both of which require a plaintiff to show that the defendant was guilty of something more than mere negligence—place no limit on defendants' ability to seek contribution. See 15 U.S.C. §§ 78i(e) and 78r(b).

First, Section 9 is the express-cause-of-action provision that comes closest to the broad reach of Section 10(b). Indeed, even the language used by Congress in the two sections is similar. Compare 15 U.S.C. § 78i (prohibiting a variety of "manipulat[ive]" practices) with *id.* § 78j(b) (barring the use of "any manipulative or deceptive device or contrivance" in violation of rules adopted by the SEC). This similarity in coverage provides strong support for applying the contribution rule set forth in Section 9.[5]

Second, all three of these express causes of action resemble Section 10(b) in that each subjects a wide variety of individuals to liability. Thus, liability under these sections extends to "[a]ny person who willfully participates" in the manipulation of security prices (15 U.S.C. § 78i(e)); "[a]ny person who shall make or cause to be made" a false or misleading statement in a filing (15 U.S.C. § 78r); and any person who signed a false registration statement, was (or was named in the statement as) a director of or partner in the issuer, or has with his consent been named as having prepared or certified any part of the registration statement or a related report or valuation, such as an accountant, engineer, or appraiser (15 U.S.C. § 77k(a)). Section 10(b), of course, imposes liability on "any person" who violates the broad prohibitions set forth in that provision.

Third, the three express causes of action are the only provisions "under which Congress envisaged joint liability by multiple defendants." Note, *Contribution Under the Federal Securities Laws*, 1975 Wash. U. L.Q. 1256, 1258. Accord 3 L. Loss, *Securities Regulation* 1739-1740 n.178 (2d ed. 1961). Joint liability is commonplace under Section 10(b).

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[5] This Court indicated in *Lampf* that the cause of action created in Section 9 is the one most analogous to the Section 10(b) action. 111 S. Ct. at 2782 n.9.

It is clear from these "similar and related" provisions, then, that Congress would also have provided for contribution under Section 10(b) if it had known that it was creating a private right of action under that section. Given Congress's decision to authorize contribution in the express causes of action, and the close "fit" between those provisions and Section 10(b), the inference regarding congressional intent is compelling. Cf. *Lampf*, 111 S. Ct. at 2780.

2. *The Express Causes Of Action Cited By Petitioners Are Not Analogous To The Section 10(b) Action.*

Petitioners contend that Congress's intent regarding contribution cannot be discerned from these three express causes of action because other express-cause-of-action provisions of the securities laws do not authorize contribution. This fact, petitioners argue, shows that "Congress had no general intention to grant contribution rights to joint wrongdoers" under the securities laws. Pet. Br. 25. The provisions cited by petitioners, however, differ significantly from Section 10(b). Thus, while Congress did not determine that contribution was appropriate for every cause of action created in the federal securities laws, it clearly did determine that contribution was appropriate for all causes of action with the characteristics of the action implied under Section 10(b). There can be no doubt that Congress would have reached the same conclusion with respect to Section 10(b).

a. *Section 16.* Section 16 of the Securities Exchange Act, 15 U.S.C. § 78p(b), provides for disgorgement of profits made by corporate insiders on "short-swing" transactions in company stock. In *Lampf*, the Court specifically rejected Section 16 as a basis for inferring congressional intent with respect to Section 10(b) because of the significant differences between the two sections. Section 16, the Court reasoned, "requires the disgorgement of unlawful profits and differs in focus

from § 10(b) and from the other express causes of action." 111 S. Ct. at 2780 n.5.

Section 16 provides an especially inapt analogy with respect to the contribution question because contribution would make no sense where a defendant is required to disgorge the profits that *he himself* obtained through unlawful activity. See 15 U.S.C. § 78p(b) (requiring disgorgement by owner, director, or officer of "any profit realized *by him* from any purchase and sale, or any sale and purchase, of any equity security of such issuer * * * within any period of less than six months") (emphasis added). Contribution comes into play only where a defendant is jointly and severally liable for harm caused by himself and others and pays more than his fair share. See page 5, *supra*; Loewenstein, *Implied Contribution Under the Federal Securities Laws: A Reassessment*, 1982 Duke L.J. 543, 551. Because liability under Section 16(b) is by definition limited to the particular defendant's own "share"—the "profit realized by him"—contribution simply is not needed to effect a fair allocation of responsibility.[6]

In view of the nature of the Section 16 remedy, then, the absence of a contribution right in that section is to

[6] Petitioners cite *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418 (1972), for the proposition that "Section 16 may trigger multiple liability of co-owners of the security traded, and a short swing seller may be an entity with numerous control persons." Br. 27. In fact, *Reliance Electric*—which involved only one owner alleged to have made an unlawful short swing profit—says nothing about multiple liability or entities with more than one control person. In any event, the possibility that more than one co-owner (or more than one control person of a single corporate owner) may be *individually* liable under Section 16(b), each for his own unlawful profits, does not refute the point that contribution makes no sense where disgorgement, as opposed to damages, is the remedy. Nor does it change the fact that the *language* of Section 16 plainly contemplates individual, rather than joint and several, liability.

be expected. Because the Section 10(b) action does not share the relevant characteristics of the Section 16 action, the absence of contribution from Section 16 reveals nothing about what Congress would have intended with regard to Section 10(b).

b. *Section 12.* Petitioners also rely upon Section 12 of the Securities Act of 1933, 15 U.S.C. § 77*l*, which imposes liability on any person who offers or sells an unregistered security or offers or sells a security by means of a false prospectus or oral communication. That provision differs in several important respects from Section 10(b) and therefore does not provide an appropriate source for deriving a contribution rule for Section 10(b) actions.

To begin with, the focus of Section 12 is narrower than that of Section 10(b). The former applies only to false statements made by sellers of securities. Section 10(b), of course, applies to a much wider variety of fraudulent conduct.

In addition, the class of potential defendants under Section 12 is limited to a person who passes title to a security or who "successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Pinter* v. *Dahl*, 486 U.S. 622, 647 (1988). This Court specifically rejected a test that would have imposed liability on all persons whose actions were a "substantial factor" in causing a securities transaction to take place because such an approach "would extend * * * liability to participants only remotely related to the relevant aspects of the sales transaction. Indeed, it might expose securities professionals, such as accountants and lawyers, whose involvement is only the performance of their professional services, to * * * strict liability for rescission." *Id.* at 651.[7]

[7] Although *Pinter* addressed only the scope of liability under Section 12(1), the courts have uniformly held that its reasoning

As a consequence of this legal standard, the number of persons liable under Section 12 in any one case is likely to be quite small. In many situations, there will be only one defendant—the actual owner of the securities. See Loewenstein, *supra* at 551 ("Congress probably assumed that only one person could be liable for a violation of [Sections 12(1) and 12(2)] since the language of those sections imposes liability on any person who sells a security in violation of the sections 'to the person purchasing such security from *him*'"). Section 10(b) and the express causes of action, by contrast, typically reach multiple defendants in every single case.

Moreover, Section 12 liability is limited to persons intimately involved in the consummation of the sales transaction. This Court's construction of the provision in *Pinter* expressly precludes its application to the wide variety of actors—accountants, lawyers, and the like—who may be reached under Section 10(b) and the express causes of action.

The limitation of liability under Section 12 to a single or, at most, a small group of wrongdoers at the center of an unlawful transaction sharply distinguishes the provision from Section 10(b) and from the express causes of action that do provide for contribution. One important consideration in determining whether contribution is appropriate as a matter of policy is whether the broad reach of a provision will result in the imposition of all of the liability on a party who had only a tangential role in the wrong. See pages 22-26, *infra*. Because Section 12 liability is limited to a few parties, and only those parties who play a central role in a securities transaction,

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applies with equal force to Section 12(2), which also refers to "[a]ny person who * * * offers or sells a security." 15 U.S.C. § 77*l*(2). See, *e.g.*, *Moore* v. *Kayport Package Express, Inc.*, 885 F.2d 531, 535 (9th Cir. 1989); *Wilson* v. *Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1126 (2d Cir. 1989); *In re Craftmatic Sec. Litig.*, 890 F.2d 628, 635-636 (3d Cir. 1989). See also *Pinter*, 486 U.S. at 642 n.20.

the need for contribution is much less compelling than it is when liability is imposed on a variety of persons with disparate levels of involvement in the wrongdoing. The broad reach of Sections 9 and 18 of the Securities Exchange Act and Section 11 of the Securities Act explains why Congress concluded that contribution was proper with respect to those provisions, and why it would have done the same with regard to Section 10(b).[8]

c. *Sections 15 and 20.* Finally, petitioners point to Section 15 of the Securities Act, 15 U.S.C. § 77*o*, and Section 20 of the Securities Exchange Act, 15 U.S.C. § 78t, which impose civil liability on persons who "control" other persons found liable under the substantive provisions of the Acts. These provisions do not create causes of action, however. They simply subject an additional class of persons to liability under the causes of action created elsewhere in the securities laws.

There would have been no reason for Congress to include an authorization of contribution in a provision that does not create a cause of action. Contribution may be obtained by, and against, controlling persons if it is authorized under the cause of action that is the basis for the suit. See *Laventhol, Krekstein, Horwath & Horwath* v. *Horwitch*, 637 F.2d 672, 675 (9th Cir. 1980), cert. denied, 452 U.S. 963 (1981) (controlling persons were liable for contribution despite Section 15's silence on contribution because the underlying liability provision, Section 11, provides for contribution). These provisions therefore provide no evidence of Congess's intent regarding the availability of contribution.[9]

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[8] It also is significant that Section 12—in contrast to Sections 9 and 18 of the Securities Exchange Act, Section 11 of the Securities Act, and the Section 10(b) action—provides for a rescissionary measure of relief in all cases. See *Pinter*, 486 U.S. at 641-642 nn. 18 & 20; *Randall* v. *Loftsgaarden*, 478 U.S. 647, 655-656 (1986).

[9] Petitioners also invoke (Br. 27) Section 20A of the Securities Exchange Act, 15 U.S.C. § 78t-1, as evidence that Congress would

In sum, Congress expressly provided for contribution when it created the causes of action most analogous to the one implied under Section 10(b). Under the analysis used by the Court in *Lampf*, it is clear that Congress would have provided for contribution under Section 10(b) if it knew that there would be a private damages action under that section.

Indeed, failure to recognize a right to contribution under Section 10(b) would disrupt Congress's plan. By providing for contribution under Sections 9 and 18 of the Securities Exchange Act and Section 11 of the Securities Act, Congress made clear that plaintiffs should not be given the option of imposing all of the liability on only one party. If contribution were unavailable under Section 10(b), a plaintiff could achieve precisely that result by asserting his claim solely under Section 10(b). Cf. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 210 (refusing to extend Section 10(b) actions to negligent wrongdoing because doing so would allow plaintiffs to avoid procedural restrictions on negligence actions provided by other sections). Acceptance of petitioners' submission would thus effectively overturn Congress's policy judgment. This Court should not countenance that result.[10]

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not have intended to provide contribution under Section 10(b). The Court in *Lampf*, however, specifically rejected Section 20A as a source for deriving a rule for Section 10(b) because Section 20A was added to the Securities Exchange Act in 1988, "more than 50 years after the original securities statutes, [and] focuses upon a specific problem, namely * * * 'insider trading.'" 111 S. Ct. at 2781. Moreover, the Court noted that Section 20A itself indicates that Congress did not intend to extend that Section's provisions to other sections of the Securities Exchange Act. *Ibid.* See 15 U.S.C. § 78t-1(d) ("[n]othing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this chapter or the availability of any cause of action implied from a provision of this chapter").

[10] Petitioners observe (Br. 21-22) that two courts of appeals have declined to apply to the Section 10(b) action the provision of some of the express causes of action authorizing the courts to condition

3. *Petitioners Have Presented No Reason To Reject Congress's Policy Judgment That Contribution Furthers The Purposes Of The Securities Laws.*

Petitioners and amicus National Association of Securities and Commercial Law Attorneys ("NASCAT") also contend that permitting contribution under Section 10(b) is bad policy. Specifically, they argue that contribution lessens the deterrent effect of the securities laws, discourages settlements, and imposes an unjustified burden on plaintiffs and courts. Pet. Br. 37-41; NASCAT Br. 15-29.

The principal flaw in these contentions is that Congress specifically found to the contrary. By providing for contribution in Sections 9 and 18 of the Securities Exchange Act and Section 11 of the Securities Act, Congress clearly determined that contribution furthers the goals of the securities laws. As we have discussed, Congress's policy judgment with respect to these provisions is equally applicable to Section 10(b). That legislative judgment, and not petitioners' or NASCAT's arguments to the contrary, should control the disposition of this case. In any event, there is ample support for Congress's determination that the relevant policy considerations weigh heavily in favor of contribution.[11]

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the prosecution of a private damages action upon the posting of security for any costs that might subsequently be awarded against the plaintiff. Those lower court rulings—which substantially predated *Lampf* and *Blue Chip Stamps*—obviously provide no basis for abandoning the methodology for configuring the Section 10(b) action applied by this Court in the latter decisions. That methodology plainly establishes that Congress would have permitted contribution in actions under Section 10(b).

[11] In the absence of clear evidence of what Congress would have intended, the Court has looked to policy considerations in order to resolve questions regarding the contours of the Section 10(b) action. *Blue Chip Stamps*, 421 U.S. at 737. Cf. *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2764 (1991). That course is not nec-

a. *Contribution Promotes Fairness By Ensuring That Primary Wrongdoers Do Not Escape Liability.*

"'There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.'" *Heizer Corp.* v. *Ross*, 601 F.2d 330, 333 (7th Cir. 1979) (citation omitted). See also *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 558-559 (5th Cir. 1981), aff'd in part, rev'd in part on other grounds, 459 U.S. 375 (1983) (failing to permit contribution leads to inequitable results); Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 Iowa L. Rev. 533, 541 (1981) ("it is irrational to compel one or more defendants, who may not have been the primary instigators of the fraudulent scheme, to bear the entire loss, while allowing other more culpable wrongdoers to escape liability completely").

Indeed, this Court has recognized as much in the admiralty context. *Edmonds* v. *Compagnie Generale Transatlantique*, 442 U.S. 256, 271-272 n.30 (1979) (contribution "remedies the unjust enrichment of the concurrent tortfeasor"); *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974) ("a 'more equal distribu-

essary here, because, as we have discussed, Congress plainly would have included a contribution right in Section 10(b).

Amicus NASCAT asserts (Br. 12-13) that this Court's decision in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977), precludes recognition of a contribution right. But the Court in *Santa Fe* simply "adhere[d] to the position that 'Congress by § 10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement.'" *Id.* at 479 (citation omitted). Here, Congress plainly determined that contribution is a necessary element of the express claims most analogous to Section 10(b) and the relevant policy considerations support that determination. Because recognition of the contribution right is thus entirely consistent with congressional intent and with the applicable policies, *Santa Fe* supports the authorization of contribution here.

tion of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame") (citation omitted). The same conclusion applies with respect to Section 10(b).

The contrary position of petitioners and NASCAT is based on a fundamentally incorrect premise: that all defendants (or potential defendants) in securities cases are equally culpable. The reality in most securities litigation, however, is that a core of "insider" defendants is primarily responsible for making a material misrepresentation or devising and implementing a fraudulent scheme, typically in order to reap a financial gain from the victims of the fraud. The remaining defendants—such as outside directors, underwriters, lawyers, and accountants—are responsible only for failing to uncover the fraud. Moreover, such defendants stand to gain nothing but their fees for services rendered.[12]

The need for contribution is especially acute in these circumstances. It would be extremely unjust if a party held liable for failing to detect fraud were required to pay all of the plaintiff's damages, while the party who planned and executed the fraudulent scheme—and stood to gain financially from its success—escaped all liability. Contribution prevents such injustice by ensuring that the more culpable parties are required to pay for their wrongdoing.

b. *A No-Contribution Rule Would Encourage "Strike Suits."*

Elimination of the contribution right would encourage meritless securities litigation. A plaintiff could isolate a

[12] In this respect, securities litigation differs greatly from antitrust suits, in which the nature of the wrong committed by co-conspirators—and the type of potential benefit they stand to gain—is more roughly equivalent.

single "deep-pocket" entity—such as an auditor, lawyer, underwriter, or outside director—by naming only that party as a defendant in the Section 10(b) action, using settlements with more culpable defendants to isolate such a defendant, or threatening to enforce a judgment against only that defendant. Because such a defendant would face exposure for the plaintiff's entire loss, the pressure to settle would be great. Even where the defendant was entirely innocent, and the risk of losing was small, the defendant might well choose to settle rather than incur large attorneys' fees and face a potential loss of hundreds of millions of dollars.

In every case, therefore, innocent parties could be subjected to significant pressure to settle because of the threat of exorbitant liability and fees. As the Fifth Circuit has observed, "[t]he disallowance of contribution * * * encourages the presentation of enormous claims against numerous defendants in the hope that at least some of those named will, merely to avoid the heavy cost of litigation, pay a settlement amount rather than defend the action." *Huddleston*, 640 F.2d at 558. See also *River Garden Farms, Inc.* v. *Superior Court*, 103 Cal. Rptr. 498, 503 (Cal. Ct. App. 1972) ("[i]n a multi-party case the threat of an unshared judgment against the last remaining defendant—diminished only by meager settlements with his eager fellows—permits a plaintiff to create acute financial pressures bordering on extortion").

c. *Contribution Enhances The Deterrent Effect Of Section 10(b) Actions.*

Contribution increases deterrence by reducing the possibility that a participant in securities fraud will escape liability completely. *Laventhol, Krekstein, Horwath & Horwath*, 637 F.2d at 675. Accord *Tucker* v. *Arthur Anderson & Co.*, 646 F.2d 721, 727 n.7 (2d Cir. 1981); *Heizer Corp.*, 601 F.2d at 332; *Huddleston*, 640 F.2d at 558; 5D A. Jacobs, *Litigation & Practice Under Rule 10b-5* § 264.02[c], at 11-442 to 11-443 (2d ed. 1992)

("deterrence favors granting contribution. Contribution tends to increase the diligence of potential defendants because each of them knows that he will be responsible for a portion of the damages, whether or not the defrauded investor names him in the lawsuit").

This Court has long recognized contribution's added deterrent effect in the admiralty context: "A rule that divides damages by degree of fault would seem better designed to induce care * * * because it imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others." *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 405 n.11 (1975). See also *Cooper Stevedoring Co.*, 417 U.S. at 111 (noting that where two parties are at fault, contribution serves "[t]he interests of safety" by making both "'more careful'") (quoting *The Alabama*, 92 U.S. 695, 697 (1876)).

Petitioners contend that contribution lessens deterrence by allowing defendants to spread the cost of liability, and that risk-averse managers will be more deterred by the prospects of "catastrophic loss" that would result from liability for the entire amount of damages. Pet. Br. 40. See also NASCAT Br. 16-17. That assertion is contradicted by petitioners' own statement that persons who violate Section 10(b) "may be completely unfamiliar with contribution" and that, even if they knew it existed, their conduct would not be affected by contribution because its benefits are too uncertain. Pet. Br. 37-38. Petitioners thus concede that contribution cannot adversely affect deterrence.

Furthermore, in the securities context at least, the strong prospect of liability for some proportion of the damages is a greater deterrent than the slight prospect of liability for all the damages. In the absence of contribution, the person who devises and executes a fraudulent scheme may be undeterred because a "deep pocket"

law firm or accountant that fails to uncover his scheme will make a more inviting target for plaintiffs, allowing the perpetrator of the fraud to get off scot-free (or at the small price of a pre-trial settlement). In these circumstances, "[r]efusal of relief to those less blameworthy would frustrate the purpose of the securities laws; it would not serve to discourage the actions of those most responsible for organizing forbidden schemes; and it would sacrifice protection of the general investing public in pursuit of individual punishment." *Pinter* v. *Dahl*, 486 U.S. at 636 (allowing defendants to assert the *in pari delicto* defense under Section 12 only where the plaintiff is at least as blameworthy as the defendant). See also Adamski, *supra*, at 541 ("[o]n balance it seems that the court's allowance of contribution, which thus provides a more probable threat of liability even though for only a portion of total damages, better serves the deterrent purposes of the securities laws than would * * * a rule prohibiting contribution").

At the same time, a contribution regime supplies more than enough deterrence for parties such as auditors, lawyers, outside directors, and underwriters. The benefit to such parties from securities fraud typically is claimed to be the continued receipt of fees from the issuer. But a proportionate share of the damages will in every case exceed many times over any conceivable gain from securities fraud. The threat of liability will therefore provide a sufficient deterrent to wrongdoing.

d. ***Contribution Does Not Obstruct Settlements, But Rather Reduces The Risk Of Collusive Settlements Between Plaintiffs And Primary Wrongdoers.***

NASCAT's assertion (Br. 18-22) that contribution rights obstruct settlement is belied by experience. Contribution under the securities laws is available (and has been for some time) in almost every jurisdiction in the

country. Yet, studies show that "virtually all securities-fraud class-action cases are resolved through settlement." F. Dunbar, National Economic Research Associates, Inc., *Recent Trends in Securities Class Action Suits*, Table 1 (Aug. 1992) (of 356 class-action suits studied, 336 were settled, 14 were dismissed, and 6 went to judgment). See also O'Brien, *The Class-Action Shakedown Racket*, Wall St. J., Sept. 10, 1991, at A20 (finding 96% settlement rate in securities class-action suits); Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 525 (1991) ("all evidence indicates that the settlement rate for securities class actions is much higher than for civil litigation generally"); *ibid.* (less than 5% of securities actions in 1987 went to trial); Kennedy, *Securities Class and Derivative Actions in the United States District Court for the Northern District of Texas: An Empirical Study*, 14 Houston L. Rev. 769, 811 (1977) (6% of cases studied were tried, 83% settled, and 11% dismissed without any settlement). Contribution plainly is not obstructing settlement of Section 10(b) claims.

Moreover, as this Court observed in *Northwest Airlines*, 451 U.S. at 86-87 & n.16, contribution has become virtually the universal rule in this country. See also *Restatement (Second) of Torts* § 886A (1979) (endorsing contribution); 3 F. Harper, F. James & O. Gray, *The Law of Torts* § 10.2, at 40-42 (2d ed. 1986). Neither petitioners nor NASCAT have shown that the widespread adoption of the contribution principle has prevented settlement. Cf. *Reliable Transfer Co.*, 421 U.S. at 408 (in rejecting the argument that a rule requiring the allocation of damages according to defendants' comparative fault would discourage settlements, the Court observed that "[e]xperience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements").

Furthermore, even in theoretical terms, contribution would discourage settlement only if defendants who went to trial and were found liable were then permitted to seek contribution from defendants who had settled. If non-settling defendants were barred from recovering contribution from settling defendants, however, the incentive to settle would be the same as under a no-contribution rule. See Adamski, *supra*, at 542; *Donovan* v. *Robbins*, 752 F.2d 1170, 1180-1181 (7th Cir. 1985) (Posner, J.). Thus, the approach adopted by the Ninth Circuit and other courts—whereby non-settling defendants are barred from recovering contribution from settling defendants, but the total judgment against the non-settling defendants is reduced by the settling defendants' share of liability—preserves the fairness and deterrence functions of contribution without discouraging settlements. *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222, 1231 (9th Cir. 1989), cert. denied, 111 S. Ct. 232 (1990). Accord *United States Fidelity & Guar. Co.* v. *Patriot's Point Dev. Auth.*, 772 F. Supp. 1565, 1572-1577 (D.S.C. 1991); *In re Sunrise Sec. Litig.*, 698 F. Supp. 1256 (E.D. Pa. 1988). See also Uniform Comparative Fault Act § 6 (1977) (adopting identical rule for common law tort actions); *Donovan*, 752 F.2d at 1180-1181 (ERISA); *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246, 1248 (5th Cir. 1979) (admiralty); *Gomes* v. *Brodhurst*, 394 F.2d 465, 468-469 (3d Cir. 1967) (tort).

A no-contribution rule, on the other hand, would encourage an unfair "rush to settlement" in which some parties (frequently the most culpable ones) would be able to "extricate themselves from the litigation in exchange for relatively small settlement amounts, leaving the non-settling defendants to bear a much larger liability in the form of the final court judgment." *Huddleston*, 640 F.2d at 558. Not only are such partial settlements unfair to the non-settling defendants—who are isolated solely because of their "deep pockets," without regard to their

relative culpability—but they do not even terminate the litigation, as the suit against the non-settling defendants continues. See *ibid.*[13]

e. *Contribution Has Not Created An Unmanageable Administrative Burden.*

Finally, petitioners and NASCAT argue that the Court should eliminate contribution in Section 10(b) actions in order to avoid the need to resolve ancillary issues—such as what method of damages allocation to use—and to relieve courts of the additional proceedings that contribution entails. Pet. Br. 38-40; NASCAT Br. 22-24. But courts already must resolve the additional issues raised by a contribution rule in cases brought under the securities law provisions that expressly provide for contribution. See, *e.g.*, *Kaypro Corp.*, 884 F.2d 1222 (Section 11). And this Court has recognized contribution rights in admiralty cases (see *Cooper Stevedoring Co.*, 417 U.S. at 111, and *Reliable Transfer Co.*, 421 U.S. at 397); and almost every state provides for contribution in some form (see page 27, *supra*). The task of establishing the relatively few standards needed to guide the contribution inquiry has not proved overwhelming in any of these settings.

In addition, there is no indication that contribution rights have impeded the prosecution of meritorious claims or overburdened courts in cases under the provisions of the securities laws that provide for contribution or in admiralty or state court cases. Petitioners' unsupported assertions provide no basis for rejecting what has, without any apparent adverse effect on the system, become the norm in most litigation in this country.

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[13] Even if defendants' willingness to settle might be affected, that would not provide grounds for eliminating contribution. "Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations." *Reliable Transfer Co.*, 421 U.S. at 408.

More fundamentally, the no-contribution rule's supposed ease of application fails to justify its extreme unfairness and the deleterious consequences such a rule would have on securities litigation. Cf. *Reliable Transfer Co.*, 421 U.S. at 407-408 (adopting comparative-fault rule in admiralty cases despite "[p]otential problems of proof" and resulting increase in litigation because alternative rule "produce[d] unjust results"). Any administrative efficiency resulting from a no-contribution rule would likely be outweighed by an increase in meritless strike suits against "deep pocket" defendants. See pages 23-24, *supra*. In sum, the relevant policy considerations weigh decidedly in favor of allowing contribution.

B. This Court Has The Power To Leave In Place The Longstanding Practice Of Allowing Contribution Among Defendants In Section 10(b) Actions.

Petitioners contend that the analysis set forth above is not dispositive in this case. They assert that the Court must bar contribution claims even in the face of compelling evidence that Congress would have provided for contribution had it known that there would be a private damages action implied under Section 10(b). The only permissible course, they assert, is for the Court to reject over two decades of precedent under which contribution has been a settled element of the Section 10(b) action, and reconfigure the Section 10(b) remedy so that it bears no resemblance to what Congress would have done and, indeed, frustrates Congress's express determination that contribution should be available with respect to claims similar to those that may be asserted under Section 10(b). Nothing in this Court's jurisprudence requires that absurd result.

1. *There Is No Basis For Distinguishing The Decision Whether Defendants May Allocate Damages Through Contribution From The Numerous Determinations Previously Made By This Court Regarding The Contours Of The Section 10(b) Remedy.*

Petitioners recognize that this Court has made a number of determinations regarding the Section 10(b) action, including fixing the statute of limitations; delineating the class of persons entitled to assert a claim for damages; and establishing the measure of damages. See *Lampf, supra; Blue Chip Stamps, supra; Randall* v. *Loftsgaarden*, 478 U.S. 647, 663 (1986). Petitioners concede the Court's authority to make those determinations because they constitute part of the "inevitable task of fleshing out the contours of the [Section 10(b)] claim." Br. 16. But petitioners assert that this case is different because it involves "neither an elaboration nor even an extension of a private right implied for an investor who has suffered loss as a result of violation of § 10(b)." *Id.* at 17. In petitioners' view, the Court lacks the power to permit contribution unless the contribution right can be justified independently under the analysis that the Court uses in deciding whether to recognize entirely new causes of action.

This Court has never endorsed the distinction drawn by petitioners. In *Northwest Airlines* and *Texas Industries* the Court did characterize a contribution claim as a "right of action." *Northwest Airlines*, 451 U.S. at 91; *Texas Indus.*, 451 U.S. at 638. But the Court had no occasion to—and did not—distinguish contribution from other issues relating to the parameters of a particular remedy. It simply invoked the congressional intent test that applies in determining all questions relating to express causes of action and held that contribution is permissible, in the context of an express action, only where

Congress has affirmatively manifested its intent to authorize it. [14]

In fact, although the contribution right may as a technical matter involve a cause of action different from the plaintiff's claim, contribution is in no sense an entirely separate action. Rather, contribution is so intimately bound up with the remedy invoked by the plaintiff that it simply makes no sense to treat the contribution issue differently from other questions regarding the scope of the remedy. The recognition of a cause of action should carry with it the power to address all subsidiary questions necessary to make that cause of action complete. Cf. *Virginia Bankshares*, 111 S. Ct. at 2764 (contours of cause of action developed without reference to congressional intent "need not be frozen" but rather may be "round[ed] out" to avoid inequity). The existence of a contribution right plainly constitutes one of those subsidiary questions.

First, a contribution claim is not at all independent of the plaintiff's action under Section 10(b); rather, it is entirely dependent upon and subsidiary to the plaintiff's action. The essence of the contribution claim is that the defendant in contribution is jointly liable to the plaintiff for the injury that is the basis of the plaintiff's suit. See page 5, *supra*. To the extent the plaintiff's claim fails, the contribution claim will necessarily expire. And in order to prevail in contribution, a party must prove that the defendant in contribution violated Section 10(b) and caused the very injury sued upon by the plaintiff. The contribution claim is thus entirely derivative of the plaintiff's Section 10(b) claim.

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[14] As we have discussed (see pages 10-11, note 2, *supra*), the Court in both cases expressly left open the question whether the same analysis would apply in determining the availability of contribution in Section 10(b) actions.

Second, the function of contribution is simply to allocate the damages due to the plaintiff among the potentially culpable parties. Determining the availability of contribution thus fixes part of the "contour" of the Section 10(b) claim in the same way as resolving questions regarding the measure of damages, the requisites of a plaintiff's standing to recover damages, and the statute of limitations. Indeed, as petitioners themselves acknowledge (Br. 37-40), the policy considerations relevant in determining whether contribution is appropriate relate entirely to the purposes of the overall Section 10(b) remedy. Contribution simply has no existence apart from the remedy to which it applies.

Third, petitioners are quite wrong in distinguishing (Br. 11) the contribution inquiry on the ground that contribution claims enhance the reach of the federal courts. Contribution by its nature cannot expand the class of potentially liable parties because any party joined as a defendant in contribution could have been named as a defendant by the plaintiff, and that party's liability will be determined according to precisely the same substantive standards. Indeed, in many—probably most—situations, contribution claims are not even asserted separately, but rather are part of the same formal action as the plaintiff's Section 10(b) claim.[15]

In sum, there is no basis for petitioners' distinction between the contribution question and the other issues regarding the parameters of the Section 10(b) remedy that have been resolved by this Court. All are subsidiary issues that must be addressed in order to create a complete remedy. And, because Congress plainly would have provided for contribution if it had known a private right of action would be implied under Section 10(b), the

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[15] Federal Rules of Civil Procedure 13 and 14 authorize the assertion of contribution claims as part of the initial action.

Court can and should allow contribution to continue to be available to defendants in these actions.[16]

2. *Even If The Contribution Issue Were Analyzed As Though The Question Were Whether The Court Should Recognize A Wholly New And Independent Cause Of Action, The Court Has The Power To Permit Contribution In Section 10(b) Cases.*

If the Court were to determine, contrary to our submission, that the contribution question must be resolved according to the principles the Court uses to decide whether to recognize a wholly independent cause of action, the appropriate outcome in this case would not change. The contribution right may be justified on three separate rationales.

a. *Longstanding Judicial Acceptance.* This Court repeatedly has stated that its recognition of the Section 10(b) action rests not on a finding that Congress intended to create a cause of action, but rather on "acquiesce[nce]

[16] Petitioners suggest (Br. 11) that permitting contribution would "implicate[] separation-of-powers concerns" because it would extend the power of the federal courts. But, as discussed above, contribution would not expand the class of persons who could be brought before the federal courts as defendants. Petitioners' citation of *Franklin* v. *Gwinnett County Public Schools*, *supra*, is inapposite both for that reason and because the Court there indicated that any separation-of-powers concerns would result from the intrusion of the federal courts into the authority of the Legislative and Executive Branches. Here, the Court has already intruded into that sphere by creating the Section 10(b) remedy in the first place. Failure to recognize a contribution right would *increase* the intrusion by configuring the Section 10(b) remedy in a way that would further disrupt Congress's plan, as a practical matter nullifying Congress's decision to authorize contribution in the express causes of action. Finally, this Court has expressly rejected the contention "that the judicial recognition of an implied private remedy violates the separation-of-powers doctrine." *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 375-376 (1982). That conclusion is especially appropriate with respect to the contribution question before the Court in this case.

in the 25-year-old acceptance by the lower federal courts of an implied action under § 10(b)." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 577-578 n.19 (1979). See also *Cannon* v. *University of Chicago*, 441 U.S. 677, 692 n.13 (1979). The Court considered whether the same rationale could be used to imply a private action under Section 17(a) of the Securities Exchange Act, 15 U.S.C. § 78q(a), but held that it could not because there was "no similar history of longstanding lower-court interpretation"; the Court observed that a private action had been recognized in only two cases in 45 years. *Touche Ross & Co.*, 442 U.S. at 577-578 n.19.

The right to contribution in Section 10(b) actions plainly has a history of "longstanding lower-court interpretation" sufficient to trigger this principle. The right was first recognized in a reported decision in 1968 (see *deHaas* v. *Empire Petroleum Co.*, 286 F. Supp. 809 (D. Colo. 1968), modified on other grounds, 435 F.2d 1223 (10th Cir. 1970)), consistently held to be available in numerous decisions from that time until 1988, and repeatedly reaffirmed by most courts since then.[17] Every

[17] See, *e.g.*, *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 160 (4th Cir. 1991); *Smith* v. *Mulvaney*, 827 F.2d 558, 560 (9th Cir. 1987); *Sirota* v. *Solitron Devices, Inc.*, 673 F.2d 566, 578 (2d Cir.), cert. denied, 459 U.S. 838 (1982); *Tucker* v. *Arthur Andersen & Co.*, 646 F.2d 721, 727 n.7 (2d Cir. 1981); *Stowell* v. *Ted S. Finkel Inv. Servs., Inc.*, 641 F.2d 323, 325 (5th Cir. 1981); *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 557-559 (5th Cir. 1981), aff'd in part, rev'd in part on other grounds, 459 U.S. 375 (1983); *Madigan, Inc.* v. *Goodman*, 498 F.2d 233, 238 (7th Cir. 1974); *In re Crazy Eddie Sec. Litig.*, 1992 U.S. Dist. LEXIS 13736, at *22-*24 (E.D.N.Y. Sept. 4, 1992); *Andrews* v. *Fitzgerald*, 1992 U.S. Dist. LEXIS 9315, at *7 (M.D.N.C. Feb. 7, 1992); *In re Granada Partnership Sec. Litig.*, 1992 U.S. Dist. LEXIS 14194, at *7-*8 (S.D. Tex. April 27, 1992); *McCoy* v. *Goldberg*, 778 F. Supp. 201, 203 (S.D.N.Y. 1991); *United States Fidelity & Guar. Co.* v. *Patriot's Point Dev. Auth.*, 772 F. Supp. 1565, 1569 (D.S.C. 1991); *MFS Municipal Income Trust* v. *American Medical Int'l*, 751 F. Supp. 279, 281 (D. Mass. 1990); *Baker* v. *B.P. Am., Inc.*, 749 F. Supp. 840, 842-844 (N.D. Ohio 1990); *Leavenworth Nat'l Bank & Trust*

court of appeals to address the question has ruled in favor of contribution, with the single exception of the

Co. v. *Merrill Lynch, Pierce, Fenner & Smith*, 1990 U.S. Dist. LEXIS 13163, at *5-*6 & n.5 (W.D. Mo. Sept. 26, 1990); *Fields* v. *Oliver's Stores, Inc.*, 1990 U.S. Dist. LEXIS 8155, at *2-*3 (S.D.N.Y. July 3, 1990); *In re Terra-Drill Partnerships Sec. Litig.*, 726 F. Supp. 655, 656 (S.D. Tex. 1989); *Alvarado Partners, L.P.* v. *Mehta*, 723 F. Supp. 540, 550 (D. Colo. 1989); *In re Atlantic Fin. Management, Inc. Sec. Litig.*, 718 F. Supp. 1012, 1016 (D. Mass. 1988); *Eastern Holdings, Inc.* v. *Illinois Co. Invs., Inc.*, 1989 U.S. Dist. LEXIS 8515, at *8-*9 (N.D. Ill. July 17, 1989); *In re National Smelting of New Jersey, Inc. Bondholders' Litig.*, 722 F. Supp. 152, 171, 176 (D.N.J. 1989); *Wilder* v. *Williams*, 1989 U.S. Dist. LEXIS 14044, at *12-*13 (W.D. Pa. June 7, 1989); *In re Wedtech Corp.*, 87 Bankr. 279, 288 (S.D.N.Y. 1988); *Robin* v. *Doctors Officenters Corp.*, 686 F. Supp. 199, 202 (N.D. Ill. 1988), aff'd, 915 F.2d 1120 (7th Cir. 1990); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 1988 U.S. Dist. LEXIS 16532, at *13 (W.D. Wash. July 28, 1988); *In re National Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig.*, 682 F. Supp. 1073, 1082 (C.D. Cal. 1987); *Riordan* v. *Smith Barney*, 1987 U.S. Dist. LEXIS 4827, at *2-*3 (June 8, 1987); *In re Olympia Brewing Co. Sec. Litig.*, 674 F. Supp. 597, 616 (N.D. Ill. 1987); *In re Towner Petroleum Co. Sec. Litig.*, 1987 U.S. Dist. LEXIS 1113 (E.D. Pa. Feb. 12, 1987); *Nelson* v. *Bennett*, 662 F. Supp. 1324, 1328 & n.6 (E.D. Cal. 1987); *Pepsico, Inc.* v. *Continental Cas. Co.*, 640 F. Supp. 656, 662 (S.D.N.Y. 1986); *Eacho* v. *N D Resources, Inc.*, No. 83-2903, Fed. Sec. L. Rep. (CCH) ¶ 92,067 (D.D.C. May 23, 1985); *Harrison* v. *Sheats*, 608 F. Supp. 502, 506 (E.D. Cal. 1985); *Tri-State Bank of East Dubuque* v. *Dain Bosworth Inc.*, No. CV 81-0-109, Fed. Sec. L. Rep. (CCH) ¶ 92,751 (D. Neb. Mar. 26, 1985); *Seiler* v. *E.F. Hutton & Co.*, 102 F.R.D. 880, 885-886 (D.N.J. 1984); *Phillips* v. *Merrill Lynch, Pierce, Fenner & Smith*, Civ. No. 4-81-394, Fed. Sec. L. Rep. (CCH) ¶ 91,649 (D. Minn. July 27, 1984); *Quintel Corp., N.V.* v. *Citibank, N.A.*, No. 80 Civ. 4936, slip op. (S.D.N.Y. Dec. 23, 1983); *Kennedy* v. *Josephthal & Co.*, Civ. No. 82-913-MA, Fed. Sec. L. Rep. (CCH) ¶ 99,204 (May 9, 1983); *Noonan* v. *Granville-Smith*, 532 F. Supp. 1007, 1008 (S.D.N.Y. 1982); *Maryville Academy* v. *Loeb Rhoades & Co.*, 530 F. Supp. 1061, 1073 (N.D. Ill. 1981); *In re National Student Mktg. Litig.*, 517 F. Supp. 1345, 1346-1349 (D.D.C. 1981); *Seymour* v. *Bache & Co.*, 502 F. Supp. 115, 119 (S.D.N.Y. 1980); *Nelson* v. *Quimby Island Reclamation Dist. Facilities Corp.*, 491 F. Supp. 1364, 1383 (N.D. Cal. 1980); *Marrero* v. *Abraham*, 473 F. Supp.

Eighth Circuit's contrary decision earlier this year. See *Chutich* v. *Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992).[18] That ruling rested on the erroneous theory ad-

1271, 1276-1278 (E.D. La. 1979); *Stratton Group, Ltd.* v. *Sprayregen*, 466 F. Supp. 1180, 1185 (S.D.N.Y. 1979); *McLean* v. *Alexander*, 449 F. Supp. 1251, 1266-1267 (D. Del. 1978), rev'd on other grounds, 599 F.2d 1190 (3d Cir. 1979); *Rice* v. *McDonnell & Co.*, 442 F. Supp. 952, 954 (S.D.N.Y. 1977); *Odette* v. *Shearson, Hammill & Co.*, 394 F. Supp. 946, 958 (S.D.N.Y. 1975); *B & B Inv. Club* v. *Kleinert's, Inc.*, 391 F. Supp. 720, 724 (E.D. Pa. 1975); *State Mutual Life Assurance Co.* v. *Arthur Andersen & Co.*, 63 F.R.D. 389, 393 (S.D.N.Y. 1974); *Alexander & Baldwin, Inc.* v. *Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238 (S.D.N.Y. 1974); *Liggett & Myers Inc.* v. *Bloomfield*, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974); *Getter* v. *R.G. Dickinson & Co.*, 366 F. Supp. 559, 569 (S.D. Iowa 1973); *Sherlee Land* v. *Commonwealth United Corp.*, Fed. Sec. L. Rep. (CCH) ¶ 93,749 (Jan. 16, 1973); *Altman* v. *Liberty Equities Corp.*, 54 F.R.D. 620, 623 (S.D.N.Y. 1972); *Globus, Inc.* v. *Law Research Serv.*, 318 F. Supp. 955, 957-958 (S.D.N.Y. 1970), aff'd, 442 F.2d 1346 (2d Cir.), cert. denied, 404 U.S. 941 (1971). Cf. *Gould* v. *American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 168-169 (D. Del. 1974), vacated on other grounds, 535 F.2d 761 (3d Cir. 1976) (right of contribution under Section 14(a) of Securities Exchange Act). Some courts have recognized the right of contribution, but have held contribution unavailable on the facts of the particular case. See, *e.g.*, *Heizer Corp.* v. *Ross*, 601 F.2d 330, 331-334 (7th Cir. 1979); *In re Drexel Burnham Lambert Group Inc.*, 1992 Bankr. LEXIS 1653, at *2 (S.D.N.Y. Oct. 13, 1992); *Department of Econ. Dev.* v. *Arthur Andersen & Co.*, 747 F. Supp. 922, 932 (S.D.N.Y. 1990); *In re Crazy Eddie Sec. Litig.*, 740 F. Supp. 149, 152 (E.D.N.Y. 1990); *Connecticut Nat'l Bank* v. *Reliance Ins. Co.*, 704 F. Supp. 506, 509 (S.D.N.Y. 1989); *In re Citisource Inc. Sec. Litig.*, 694 F. Supp. 1069, 1082 (S.D.N.Y. 1988); *Alexander Grant & Co.* v. *McAlister*, 669 F. Supp. 163, 165-166 (S.D. Ohio 1987); *Kilmartin* v. *H.C. Wainwright & Co.*, 637 F. Supp. 938, 940-942 (D. Mass. 1986); *Aul* v. *Coli*, No. 84 C 7884, slip op. (N.D. Ill. Sept. 23, 1986); *Ahern* v. *Gaussoin*, 104 F.R.D. 37, 40 (D. Or. 1984); *Schnell* v. *Steans*, No. 80 Civ. 2442, Fed. Sec. L. Rep. (CCH) ¶ 98,678 (May 17, 1982).

[18] Petitioners point (Br. 32) to *King* v. *Gibbs*, 876 F.2d 1275 (7th Cir. 1989), as concluding, in dictum, that there is no right of contribution under Section 10(b). But *King* addressed only the

vanced by petitioners here—the application of this Court's decisions in *Northwest Airlines* and *Texas Industries* to the action implied under Section 10(b).[19]

In these circumstances, the Court should uphold the contribution right on the same basis as it has upheld the Section 10(b) action itself—the longstanding acceptance of contribution by the lower courts.

b. *Congressional Ratification.* This Court also has grounded approval of a cause of action in congressional

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question of indemnification in Section 10(b) actions, holding that it was not available because there was no evidence that Congress intended to authorize indemnification. Indemnification stands on an entirely different footing from contribution, however, because none of the express causes of action in the securities laws authorizes indemnification. Accordingly, the congressional intent argument set forth above could not have been made in that case. Thus, although the court of appeals did criticize the rationale of its earlier decision recognizing contribution, the decision in *King* cannot be taken as any indication that the court of appeals would overrule that prior decision, in the face of the strong evidence of congressional intent to authorize contribution.

The other court of appeals decision cited by petitioners—*Baker, Watts & Co.* v. *Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989) (en banc)—involves the availability of contribution and indemnification under an express cause of action (Section 12(2) of the Securities Act, 15 U.S.C. § 77*l*(2)). That case, like this Court's decisions in *Texas Industries* and *Northwest Airlines*, does not control the question whether contribution is permissible under the private action implied under Section 10(b).

[19] Significantly, 11 years passed between this Court's decisions and their application by a court of appeals to contribution under Section 10(b). Moreover, most courts that have considered the question have specifically rejected the argument that this Court's decisions in *Northwest Airlines* and *Texas Industries* preclude finding a right to contribution under Section 10(b). See, *e.g.*, *In re Crazy Eddie Sec. Litig.*, *supra*; *Baker* v. *B.P. Am., Inc.*, *supra*; *Fields* v. *Oliver's Stores, Inc.*, *supra*; *Wilder* v. *Williams*, *supra*; *Riordan* v. *Smith Barney*, *supra*; *In re Towner Petroleum Co. Sec. Litig.*, *supra*; *Seiler* v. *E.F. Hutton & Co., Inc.*, *supra*; *Noonan* v. *Granville-Smith*, *supra*; *In re National Student Mktg. Litig.*, *supra*.

ratification of judicial decisions establishing the cause of action. Where Congress legislates in the face of a clear judicial recognition of the cause of action—and Congress leaves the cause of action intact—the Court will in some circumstances find that Congress has authorized the cause of action. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 381-382 (1982).

Indeed, the Court has applied this precise rationale to the Section 10(b) action. In *Herman & MacLean* v. *Huddleston*, 459 U.S. 375 (1983), the question was whether a Section 10(b) action is available in circumstances in which the plaintiff could invoke one of the express remedies set forth in the federal securities laws. In holding that a Section 10(b) cause of action could be asserted, the Court observed that "when Congress comprehensively revised the securities laws in 1975, a consistent line of judicial decisions had permitted plaintiffs to sue under § 10(b) regardless of the availability of express remedies." 459 U.S. at 384. "In light of this well-established judicial interpretation," the Court stated, "Congress' decision to leave § 10(b) intact suggests that Congress ratified the cumulative nature of the § 10(b) action." *Id.* at 385-386.

The same conclusion applies with respect to contribution. "When Congress acted [in 1975], federal courts had consistently and routinely" (*Huddleston*, 459 U.S. at 385) held that contribution was available in Section 10(b) actions. See pages 35-37 and note 17, *supra*. And Congress even more recently revisited the securities laws —and Section 10(b) actions in particular—when it enacted a statute in 1991 eliminating the retroactive effect of this Court's decision in *Lampf*. See 15 U.S.C. § 78aa-1. Congress's failure to change the well-settled rule regarding contribution suggests that Congress ratified that rule. The contribution right can be upheld on that ground alone.

c. *Federal Common Law.* A third basis for recognizing the right to contribution is federal common law. In *Texas Industries* and *Northwest Airlines* the Court held that a contribution right could not be based on federal common law where Congress expressly provided for a private right of action but not for contribution. Those holdings rested on two conclusions: first, that the question regarding the existence of contribution in those cases did not involve "issues of uniquely federal concern," *Northwest Airlines*, 451 U.S. at 95; *Texas Indus.*, 451 U.S. at 641-642; and second, that the Court could not "provide a new remedy which Congress has decided not to adopt," *Northwest Airlines*, 451 U.S. at 97. The Court observed that "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. * * * The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs." *Ibid.* (footnote omitted); *Texas Indus.*, 451 U.S. at 641-642, 645. Neither of these conclusions applies in the context of the judicially created Section 10(b) remedy.

To begin with, there is no danger that preserving the contribution right will upset a carefully crafted legislative scheme. Congress did not craft the Section 10(b) remedy. The presumption underlying *Northwest Airlines* and *Texas Industries*—that contribution was deliberately omitted from the statute—is for that reason wholly inapplicable here. Indeed, as we have discussed (at 20), it is *prohibiting* contribution that would upset Congress's design.

Moreover, in the peculiar circumstances of Section 10(b), there is a "uniquely federal concern" in permitting contribution. Because the remedy is entirely a creature of the federal judiciary, the Court should have

the power to make it complete. Just as the Court's common law authority over admiralty is not constrained (except when Congress acts), so too here, the Court should be able to take all steps necessary to create a properly functioning remedy. There is a "uniquely federal concern" in preventing gaps in a court-created remedy that could cause the remedy to function in a way that would not fulfill the purposes that led to its creation. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988) (observing that the Court's previous decisions had addressed "various positive and common-law requirements for a violation of § 10(b) or of Rule 10b-5").

In addition, failure to permit contribution would effectively negate the decision of the Legislative and Executive Branches—reflected in express causes of action set forth in the securities laws—to permit contribution in securities fraud actions. That would adversely effect the relationship between the branches of government, allowing the Court to trump a policy determination made by the political branches. Preserving the proper separation of functions is indisputably a matter of "uniquely federal concern." See *Texas Indus.*, 451 U.S. at 642 (referring to questions involving "the distribution of powers in our federal system" as a proper subject for the exercise of federal common law power).

Exercising the Court's federal common law authority on this basis would not create a broad precedent; the rationale is exceedingly narrow. It would apply only where the Court has created a cause of action but some perceived limitation on the Court's authority prevents it from configuring the remedy so as to conform to the surrounding congressional plan. Especially in view of the longstanding recognition of contribution, determining that contribution may no longer be a part of the Section 10(b) remedy "would be highly unjust to those who must litigate past inventions." *Lampf*, 111 S. Ct. at 2783 (Scalia, J., concurring). Federal common law should be available to

prevent that result by filling any gap in the Court's authority to permit contribution.[20]

3. *Adoption Of Petitioners' Contention That The Court Lacks The Power To Permit Contribution Would Cast Doubt On The Continued Viability Of The Section 10(b) Action.*

If the Court were to reject our submission and conclude that it lacks the power to permit contribution, its decision would necessarily call into question the vitality of the entire Section 10(b) remedy. After all, the Court's recognition of the Section 10(b) remedy rests upon the very factors just discussed—the longstanding existence of the cause of action and congressional ratification. To the extent those factors are now, under the Court's jurisprudence, an insufficient basis on which to recognize the contribution right, they would by definition no longer be sufficient to support the Section 10(b) remedy. Logic would dictate that the Court lacked the requisite judicial power when it recognized an implied cause of action under Section 10(b).

Such a decision would work a tremendous upheaval in the law, requiring either abandonment of a private right of action under Section 10(b) itself or tolerance of theoretical inconsistency of such proportions as to bring into question issues of fundamental fairness. The Court that has the power to imply a claim under Section 10(b) has the power to recognize contribution under that same section. *Leavenworth Nat'l Bank & Trust Co.* v. *Merrill Lynch, Pierce, Fenner & Smith*, 1990 U.S. Dist. LEXIS

[20] Petitioners may assert that there is no need for the Court to act because Congress can authorize contribution if it deems that step appropriate. But that contention proves too much because Congress can act with respect to any matter that may be the subject of a federal common law rule. That has not previously prevented the Court from invoking federal common law in situations that it deems appropriate. For the reasons discussed in text, the Court should follow the same course here.

13163, at *6 n.5 (W.D. Mo. Sept. 26, 1990) ("[i]t simply makes no sense and is grossly unfair to subject some defendants to liability under [an implied cause of action] of the securities laws and then, merely because the Supreme Court reversed course in the recognition of implicit causes of action, to leave those same defendants exposed to an unfair rule of no contribution. Either the 10b-5 action should be abolished or * * * a fair catalog of remedies should be available").

Adoption of petitioners' approach would in addition create considerable uncertainty regarding the scope of the courts' authority to superintend causes of action. For example, even if the Section 10(b) remedy were upheld, could the Court permit claims seeking to impose secondary liability on an aiding and abetting theory? Such a legal theory would broaden the class of persons who could be sued for damages under Section 10(b) and thereby arguably effect an expansion of the authority of the federal courts. It would therefore be quite problematic under petitioners' theory. There simply is no reason for the Court to create the confusion and uncertainty that would result from adoption of petitioners' approach.

C. Responsibility Under Section 10(b) Should Be Allocated Among Jointly Liable Defendants On The Basis Of Relative Fault.

Amicus NASCAT suggests (Br. 27-29) that if the Court concludes that contribution is permitted under Section 10(b), the Court should go on to determine the standard for allocating damages among jointly liable defendants. It is not clear to us that this case presents an occasion for the Court to address the issue, but we respond to NASCAT's arguments in the event the Court deems it appropriate to do so.

Questions regarding contribution arise in two general situations. The first is where the plaintiff's claim has been completely extinguished—whether through judgment

or settlement or otherwise [21]—and one defendant, or group of defendants, asserts that it has paid more than its share and seeks contribution from other jointly liable parties. The question there is how the shares shall be allocated among parties. That is the posture of this case.

NASCAT spends most of its time discussing the second situation: where the plaintiff has settled with some but not all jointly liable parties and, as part of the settlement, the court enters an order barring contribution claims against the settling defendants. The question there is how any subsequent judgment against the non-settling parties should be altered to take account of the settlement previously obtained by the plaintiff. We discuss the two situations separately.

1. *When The Plaintiff's Claim Has Been Extinguished, Responsibility For Paying The Settlement Or Judgment Should Turn On Relative Fault.*

There are two basic methods for apportioning responsibility for paying a settlement or judgment when the plaintiff can no longer proceed against any responsible party: the "equal shares" or "*pro-rata*" method, under which all responsible parties must shoulder equal shares of the payment to the plaintiff; and the "relative fault" or "comparative fault" method, under which the shares of the responsible parties are based upon their relative fault, as determined by the finder of fact. See 3 F. Harper, F. James & O. Gray, *The Law of Torts* § 10.2, at 51-53.

The contribution provisions in the express causes of action contained in the securities laws do not specifically indicate which method of apportionment should be used. Rather, those provisions simply state that contribution shall be available "as in cases of contract." 15 U.S.C. §§ 77k(f), 78i(e) & 78r(b).

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[21] Here, for example, the plaintiffs settled with some defendants and the statute of limitations ran on their claim against the attorneys and accountants not joined in the original action.

Although the meaning of that phrase is somewhat obscure, a number of courts and commentators have concluded that it simply expresses Congress's intent to depart from the then-traditional no-contribution rule of the common law of torts, and was not intended as a wholesale adoption of the contribution regime used in contract cases. See, *e.g.*, *Kaypro Corp.*, 884 F.2d at 1227-1228; *Smith* v. *Mulvaney*, 827 F.2d 558, 560-561 (9th Cir. 1987); *McLean* v. *Alexander*, 449 F. Supp. 1251, 1275 n.81 (D. Del. 1978), rev'd on other grounds, 599 F.2d 1190 (3d Cir. 1979); *Gould* v. *American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 170 (D. Del. 1974), vacated on other grounds, 535 F.2d 761 (2d Cir. 1976); Adamski, *supra*, at 557; Fischer, *Contribution in 10b-5 Actions*, 33 Bus. Law. 1821, 1829-1830 (1978).[22]

Courts in securities cases have for the most part apportioned liability by reference to relative fault. See, *e.g.*, *Kaypro Corp.*, 884 F.2d at 1226, 1230-31 (Section 11); *Mulvaney*, 827 F.2d at 561 (Section 10(b)); *United States*

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[22] Moreover, courts have noted that even in contract cases, *pro-rata* contribution was not the uniform rule at the time the securities laws were enacted. See *Gould*, 387 F. Supp. at 170; Fischer, *supra*, at 1830. Rather, it appears that courts started with a presumption of *pro-rata* contribution because co-obligors were presumed to benefit equally from a contract. But where evidence was introduced showing unequal benefit, courts often would allocate contribution according to the benefit each obligor received. See, *e.g.*, *Livingston* v. *Falk*, 217 N.Y.S. 131 (N.Y. App. Div. 1926); *Key* v. *Oates*, 280 S.W. 286, 288 (Tex. Civ. App. 1926), writ ref'd; 18 Am. Jur. 2d *Contribution* §§ 22-23 (1964); 18 C.J.S. *Contribution* § 8 (1990); Williston, *The Law of Contracts* § 345, at 1019 (2d ed. 1936) ("it will be inferred that the[] shares [of liability of co-obligors] are in proportion to their interest in the matter"); *Restatement of Restitution* § 85, cmt. f (1935) (where persons are engaged in a common enterprise, their liability for contribution to each other is unequal if their interests in the enterprise are unequal). See also *Kahn* v. *Weldin*, 653 P.2d 1268, 1274 (Or. Ct. App. 1982), petition denied, 662 P.2d 726 (Or. 1983); *Manning* v. *Campbell*, 204 N.Y.S.2d 718, 741 (N.Y. Sup. Ct. 1960).

Fidelity & Guar. Co., 772 F. Supp. at 1572-1577 (Section 10(b)); *Alvarado Partners, L.P.* v. *Mehta*, 723 F. Supp. 540, 550-553 (D. Colo. 1989) (Section 11 and Section 10(b)), appeal dismissed, 936 F.2d 582, 583 (10th Cir. 1991); *In re Sunrise Sec. Litig.*, 698 F. Supp. 1256, 1258-1261 (E.D. Pa. 1988) (sections of Securities Exchange Act); *McLean*, 449 F. Supp. at 1272-1277 (Section 10(b)); *Gould*, 387 F. Supp. at 169-171 (Section 14(a)); *Pepsico, Inc.* v. *Continental Cas. Co.*, 640 F. Supp. 656, 662 (S.D.N.Y. 1986) (Section 10(b)).

That result accords with the "modern trend to provide for apportionment according to relative fault." 3 F. Harper, F. James & O. Gray, *The Law of Torts* § 10.2, at 51-52. And it is the approach adopted by this Court in the admiralty context. *Reliable Transfer Co.*, 421 U.S. at 407-408.

Apportionment according to relative fault is especially appropriate in Section 10(b) actions because, as we have discussed (at pages 22-26), the culpability of the various responsible parties may vary tremendously, from persons who designed and executed a fraudulent scheme for financial gain to those who simply failed to detect that scheme. Simple fairness, as well as principles of deterrence, require that persons in the former category bear the greatest proportion of the liability.

2. *Non-settling Defendants Are Entitled To A Credit Equal To The Share Of The Judgment That The Settling Defendant Would Have Borne If He Had Proceeded To Trial.*

When the plaintiff has settled with some defendants but retains a claim against others, the situation is somewhat more complex. The settling defendant in such a situation invariably seeks a "bar order" from the court prohibiting all parties from asserting contribution claims against him.[23] Courts have again followed two courses.

[23] Issuance of such an order is usually a condition for the consummation of the settlement.

Some have held that bar orders are permissible only if any subsequent judgment against the non-settling defendants is reduced by the amount that would have been allocated to the settling defendants on the basis of their share of liability. As we have discussed (at page 28), that approach was adopted by the Ninth Circuit in the *Kaypro* case. Other courts have utilized the *pro-tanto* approach, whereby the judgment against non-settling defendants is reduced by the amount of the settlement. NASCAT Br. 27-28.

The settlement bar question plainly is not at issue in this case; the plaintiffs' claims have been extinguished. There simply is no occasion for the Court to address that issue here.

In any event, the *Kaypro* rule is by far the superior one. Absent a bar order, the non-settling defendant would be entitled to contribution on the basis of the applicable allocation method (which, as discussed above, should be according to relative fault). Why should a settlement between the plaintiff and another defendant force the non-settling defendant to pay more than his fair share? There simply is no justification for permitting one defendant to foist his liability off on another responsible party and thereby override contribution rules that serve important public policies.

Indeed, the *pro-tanto* approach has many of the same flaws as the no-contribution rule and should be rejected under Section 10(b) for the same reasons. For instance, the *pro-tanto* approach could result in collusion between the plaintiff and settling defendants: the plaintiff might accept an inadequate sum in settlement so that, with the help of the settling defendants, he could obtain a judgment against a "deep-pocket" defendant. *Kaypro Corp.*, 884 F.2d at 1230; Adamski, *supra*, at 549; *In re Sunrise Sec. Litig.*, 698 F. Supp. at 1259. The result, as with the no-contribution rule, would be an increase in strike suits,

because the plaintiff could threaten to impose the bulk of the burden of payment on less culpable defendants simply because of their "deep pockets." *Kaypro Corp.*, 884 F.2d at 1230; Adamski, *supra*, at 551; *River Garden Farms, Inc.*, 103 Cal. Rptr. at 503.

Alternatively, to minimize the risk of such collusion under the *pro-tanto* method, courts would be required to inquire into the good faith of the parties and the fairness of the settlement amount to non-settling defendants, "bogging down the settlement process in a miniature trial before trial" and minimizing any administrative efficiency that would otherwise result from settlement. *Donovan*, 752 F.2d at 1181; *United States Fidelity & Guar. Co.*, 772 F. Supp. at 1574-1575; *Alvarado Partners*, 723 F. Supp. at 553; *In re Sunrise Sec. Litig.*, 698 F. Supp. at 1259. Adamski, *supra*, at 549-550. Moreover, even with a good faith inquiry, settling defendants would retain the ability to transfer to non-settling defendants any liability not covered by the settlement, thereby forcing the latter to bear a share of liability disproportionate to their culpability. *Kaypro Corp.*, 884 F.2d at 1230. See also Adamski, *supra*, at 550; *Alvarado Partners*, 723 F. Supp. at 553; *In re Sunrise Sec. Litig.*, 698 F. Supp. at 1259. For these reasons, the *Kaypro* rule, which has been applied in numerous areas of the law (see cases cited at page 28, *supra*) is clearly superior to the *pro-tanto* rule.[24]

[24] NASCAT argues (Br. 27-28) that the *Kaypro* approach means that plaintiffs may not gain a full recovery. But if that were to occur, it would be a consequence of a plaintiff's decision to allow a defendant to settle for an amount less than the jury's determination of that defendant's share of the liability.

CONCLUSION

The judgment of the court of appeals with respect to the question presented in the certiorari petition should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 11(f) of the Securities Act of 1933, 15 U.S.C. 77k(f), provides:

> All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

2. Section 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78i(e), provides in pertinent part:

> Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction[.]
>
> • • •
>
> Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

3. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> • • •
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a

national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

4. Section 18 of the Securities Exchange Act of 1934, 15 U.S.C. 78r, provides in pertinent part:

(a) Any person who shall make or cause to be made any statement in any application, report, or document filed [with the Commission] * * * which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. * * *

(b) Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

5. Rule 10b-5, 17 C.F.R. 240.10b-5, provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Supreme Court, U.S.
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No. 92-34

In The

Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR.

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATUTES AND RULES INVOLVED

Section 11(f) of the Securities Act of 1933, 15 U.S.C. 77k(f), and §§ 9(e), 10(b) and 18 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78(j)(b) and 78r, and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1992).

STATEMENT OF THE CASE

In December 1983, Cousins Home Furnishings, Inc. ("Cousins") made an initial public offering of stock. *See* Joint Appendix ("J.A.") pp.14-15, ¶23. The stock was then traded in the open market. J.A. pp.14-15, ¶23. The prospectus for the initial public offering was written by a prominent law firm, Musick, Peeler & Garrett, which had guided Cousins through the entire public offering process. *See* J.A., p.17, ¶30 through p.23, ¶33. Members of a prominent national accounting firm, Main Hurdman, prepared the financial disclosures necessary for the prospectus. J.A. p.23, ¶34 through p.30, ¶40(e).

After negative information about Cousins was publicized, its shares dropped precipitously in value. *See* J.A. p.14, ¶23 through p.15, ¶23. The Cousins case (*"Cousins"*), a Rule 10b-5 fraud-on-the-market class action, promptly followed. The plaintiff class sued Cousins, its affiliate RB Furniture, certain of the public offering underwriters, and numerous Cousins directors and officers. *See* J.A. pp. 14-15, ¶23. The complaint in *Cousins* asserted violations of §§ 11, 12(2) and 13(b)(3) of the Securities Act of 1933, § 10(b) and Rule 10b-5 of the Securities Exchange Act, common law claims of fraud and negligent misrepresentation, and violations of §§ 1507, 2254, 25400, 25401, 25500 and 25501 of the California Corporations Code. J.A. p.14, ¶23 through J.A. p.14, ¶23.

Remarkably, counsel for the *Cousins* plaintiff class chose not to sue Cousins' accountants (Main Hurdman and J.H. Cohn) or lawyers (Musick, Peeler & Garrett).

The *Cousins* defendants and Respondents have always contended, however, that Cousins' lawyers and accountants were primarily responsible for the alleged

loss to the class. Specifically, for example, Cousins' lawyers drafted a prospectus without any "risk disclosure" section despite the high-risk nature of Cousins securities. J.A. p.19, ¶33(a). Also, Cousins' accountants materially changed the manner of accounting for revenue recognition, without disclosing same, thus artificially inflating Cousins' revenues and net income. J.A. p.28, ¶40(a) through J.A. p.30, ¶40(e).

Respondents Employers Insurance of Wausau ("Wausau") and Federal Insurance Company ("Federal"), provided indemnity insurance to all but two of the *Cousins* defendants. As part of a comprehensive settlement of the *Cousins* litigation, involving *all* defendants sued, Wausau and Federal contributed $13 million towards satisfaction of a $13.5 million settlement of *Cousins*. J.A. at p.16, ¶28.

Within one year after the settlement, Wausau and Federal initiated the present action as subrogees of their insureds. J.A., p.4, ¶1. The action asserts claims for contribution under Securities Act of 1933 § 11(f), Securities Exchange Act § 10(b), and comparative equitable indemnity under California state law, against Cousins' highly culpable lawyers and accountants. Section 11(f) leaves a gap in the securities laws as illustrated by the facts of this case. Because the lawyers were not named in the prospectus, nor did they expertise any portion thereof, they cannot be sued for contribution under § 11(f).

This action was brought because Cousins' lawyers and accountants were primarily responsible for causing the damages alleged by the *Cousins* plaintiff class, but paid nothing to compensate the victims of their deceit. J.A. at p.16, ¶28.

The trial court granted a motion to dismiss Wausau and Federal's First Amended Complaint herein with prejudice. Dismissal was ordered on the erroneous grounds that the settling *Cousins* defendants had been determined, in a good faith settlement procedure, to have paid their "fair share" of the liability to the plaintiff class, and therefore could not pursue contribution against non-party tortfeasors.

The Ninth Circuit reversed the trial court, finding that the prior procedure signified only that the *Cousins* defendants had paid their fair share *inter se*, and not vis-a-vis non-party tortfeasors, such as Petitioners.

Neither the trial court nor the Ninth Circuit ever questioned the settled proposition that a right of contribution exists under § 10(b) or Rule 10b-5. No such issue needed to be addressed at any earlier stage of this case, because the existence of that right of contribution was already settled law in the Ninth Circuit. *See Smith v. Mulvaney*, 827 F.2d 558, 560 (9th Cir. 1987).

This Court granted a Petition for Certiorari to review one issue: Whether a private right of action for contribution may be recognized under § 10(b) and Rule 10b-5.

SUMMARY OF ARGUMENT

This Court has already determined in its *in pari delicto* cases, that suits between wrongdoers are appropriate to effectuate the purposes of the securities laws. Congressional intent to permit such suits, as reflected in three express contribution sections as well as congressional oversight, and explicit approval of all implied rights of action under § 10(b) and Rule 10b-5, clearly supports the right to contribution.

A. Contribution Is Well-Established. Contribution under Securities Exchange Act § 10(b) and Rule 10b-5 has been recognized by the courts starting in 1968, and is the overwhelmingly predominant rule. At present, there are 45 cases from all but the Eighth and Eleventh Circuits recognizing contribution. There are only five cases – four district court cases (two unpublished) from the Seventh and Eighth Circuits and one case from the Eighth Circuit itself – which do not recognize contribution. This Court should not discard the great weight of precedent supporting the right of contribution.

B. The Statutory Language Supports Contribution. The Securities Exchange Act and its companion Securities Act of 1933 contain explicit contribution provisions in their

express private rights of action which, like § 10(b) and Rule 10b-5, involve scienter. These contribution provisions indicate a determination by Congress that suits between wrongdoers for contribution will further the purposes of the securities laws.

C. The Legislative History Supports Contribution. In reconsidering private actions under § 10(b) and Rule 10b-5 in preparing the Insider Trading and Securities Fraud Enforcement Act of 1988, Congress clearly and with purpose set forth in written legislative history: (1) its approval of existing court-made law defining the scope of the § 10(b) private rights of action (including contribution), (2) its approval of the process of judicial development of the § 10(b) private rights of action, and (3) a congressional mandate to the courts to continue "to develop such private rights of action in an expansive fashion in the future."

D. The Legislative Scheme Supports Contribution. The overall scheme of the securities laws supports contribution, because it reflects a congressional intent to deter wrongdoing and protect securities markets rather than merely to punish. Congress thus determined, as reflected in the explicit contribution provisions in those laws, that the beneficial deterrent value of bringing additional parties to justice through contribution outweighs any drawbacks of lessening the liability of the wrongdoers receiving contribution.

E. Congress Mandated Contribution Between Intentional Wrongdoers "as in Cases of Contract." The express language of the three contribution sections in the securities laws, and the roots of the § 10(b) cause of action in the contract between the buyer and seller of securities, makes plain that Congress intended wrongdoers to obtain contribution.

F. This Court Has Already Determined That Suits Between Wrongdoers Under § 10(b) and Rule 10b-5 Are Proper. In its decisions restricting the *in pari delicto* defense under § 10(b) and Rule 10b-5, this Court has determined that

suits between wrongdoers serve to further important purposes of the securities laws.

G. Policy Considerations of Deterrence, Fairness and Promotion of Investor Confidence Support Contribution.

H. The Holdings of Northwest Airlines *and* Texas Industries *are Confined to the Specific Statutory Schemes Therein.* Title VII and the antitrust laws, under which contribution was refused in those cases, are completely distinguishable from the securities laws in general, and § 10(b) and Rule 10b-5 in particular.

First, the securities laws contain express contribution provisions, reflecting congressional intent to permit contribution under those laws. The antitrust laws and Title VII do not contain express contribution provisions.

Second, unlike the antitrust laws and Title VII, which were aimed at punishing wrongdoers, the securities laws were designed to protect the securities markets as a whole. The securities laws, *unlike the antitrust laws and Title VII*, thus contain specific provisions permitting wrongdoers to sue for contribution, relying upon contribution's deterrent effect even if punishment is thus lessened.

Third, the securities laws, unlike the antitrust laws and Title VII, are not comprehensive so as to exclude implied remedies. The implied rights of action under § 10(b) and Rule 10b-5 have arisen out of necessity to fill in major gaps in the securities laws.

Moreover, court holdings subsequent to *Texas Industries* and *Northwest Airlines* have read these cases as confined to the statutes dealt with therein, and as not restricting contribution under § 10(b) and Rule 10b-5.

ARGUMENT

I.

CONTRIBUTION IS A WELL-ESTABLISHED RIGHT UNDER THE SECURITIES EXCHANGE ACT § 10(b)

A. Contribution Is The Prevailing Rule In United States Jurisdictions

Contribution is an equitable doctrine which allows defendants to require joint wrongdoers, even those not named by the plaintiff, to bear their fair burden of the plaintiff's damage award. *Nelson v. Bennett*, 662 F. Supp. 1324, 1327-28 (E.D. Cal. 1987). "Typically a right of contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability." *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 87-88 (1981).

Today contribution is recognized in most American jurisdictions by either statute or judicial decision. *Id.* at 86-87.[1] The traditional common law rule barring contribution between joint tortfeasors gradually eroded because it was unfair to require one defendant to bear the entire loss resulting from injury that he or she had not alone caused, or to permit the plaintiff for whatever motive, benign or invidious, to select one defendant from whom he or she wished to recover. *Huddleston v. Herman & MacLean*, 640 F.2d 534, 537 (5th Cir. 1981), *aff'd and rev'd in part on other grounds*, 459 U.S. 375 (1983).

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[1] In 1981, thirty-nine states plus the District of Columbia recognized some form of the right to contribution among joint tortfeasors. *Northwest Airlines*, 451 U.S. at 88 n.17.

Since 1981 seven more states have recognized contribution among joint tortfeasors. See A.R.S. § 12-2501 to § 12-2509 (Arizona); M.C.A. § 27-1-703 (1985) (Montana); R.S.A. § 507:7-d to -i (New Hampshire); Ohio R.C. § 2307.31; 12 Okla. Stat. § 832 (1981); South Carolina Code Ann. § 15-38-10 through § 15-38-70 (Supp. 1990); and RCW 4.22.040 (Washington). Only four states remain without such contribution.

B. Contribution Is Overwhelmingly Supported By Case Law Under § 10(b)

With the establishment of a private right of action[2] under the Securities Exchange Act of 1934 (the "Exchange Act § 10(b)") and SEC Rule 10b-5 (hereinafter collectively "§ 10(b)"), the courts continued defining the scope of § 10(b), including the remedies available to private parties damaged by violations of this section. *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 550 (D.Colo. 1989), *appeal dismissed without opinion*, 936 F.2d 582 (10th Cir. 1991).

Starting in 1968 with *deHaas v. Empire Petroleum Company*, 286 F. Supp. 809 (D.Colo. 1968), *aff'd in part, rev'd in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970), and continously to the present, federal courts have *routinely* and *consistently* held on at least forty-five occasions that an implied right of contribution exists under § 10(b).[3]

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[2] As early as 1946 a private right of action was implied under § 10(b) in *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D.Pa. 1946). This Court addressed the issue a quarter of a century later and reaffirmed with little discussion the overwhelming consensus of the lower federal courts which had recognized a private right of action under § 10(b). *Superintendent of Insurance v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971).

[3] **First Circuit:** District Courts – *In Re Atlantic Financial Management, Inc. Securities Litigation*, 718 F. Supp. 1012 (D. Mass. 1988); *MFS Mun. Income Trust v. American Medical Intern.*, 751 F. Supp. 279 (D. Mass. 1990). **Second Circuit:** Court of Appeals – *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721 (2d Cir. 1981); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566 (2d Cir. 1982), *cert. denied*, 459 U.S. 838, *cert. denied*, 459 U.S. 908; *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971). **District Courts** – *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620 (S.D.N.Y. 1972); *Herzfield v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112 (S.D.N.Y. 1974), *aff'd in part, rev'd in part*, 540 F.2d 27 (2d Cir. 1976); *Liggett & Myers Incorporated v. Bloomfield*, 380 F.

The sole exceptions to these forty-five decisions were

Supp. 1044 (S.D.N.Y. 1974); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230 (S.D.N.Y. 1974); *Odette v. Shearson, Hammill & Co., Inc.*, 394 F. Supp. 946 (S.D.N.Y. 1975); *Rice v. McDonnell & Co., Inc.*, 442 F. Supp. 952 (S.D.N.Y. 1977); *Stratton Group, Ltd. v. Sprayregen*, 466 F. Supp. 1180 (S.D.N.Y. 1979); *Noonan v. Granville-Smith*, 532 F. Supp. 1007 (S.D.N.Y. 1982), *opinion supplemented by* 535 F. Supp. 333 (S.D.N.Y. 1982); *Greene v. Emerson Ltd.*, 102 F.R.D. 33 (S.D.N.Y. 1983), *aff'd on other grounds, Kenneth Leventhal & Co. v. Joyner Wholesale Co.*, 736 F.2d 29 (2d Cir. 1984); *Jordan v. Madison Leasing Co.*, 596 F. Supp. 707 (S.D.N.Y. 1984); *Pepsico, Inc. v. Continental Cas. Co.*, 640 F. Supp. 656 (S.D.N.Y. 1986); *Dept. of Economic Dev. v. Arthur Andersen & Co.*, 739 F. Supp. 804 (S.D.N.Y. 1990); *In Re Crazy Eddie Securities Litigation*, 740 F. Supp. 149 (E.D.N.Y. 1990); *Dept. of Economic Devel. v. Arthur Andersen & Co.*, 747 F. Supp. 922 (S.D.N.Y. 1990); *McCoy v. Goldberg*, 778 F. Supp. 201 (S.D.N.Y. 1991); *In Re Crazy Eddie Securities Litigation*, 802 F. Supp. 804 (E.D.N.Y. 1992). **Third Circuit: District Courts** – *Gould v. American-Hawaiian Steamship Company*, 387 F. Supp. 163 (D.Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); *B & B Investment Club v. Kleinhart's, Inc.*, 391 F. Supp. 720 (E.D.Pa. 1975); *Muth v. Dechert, Price & Rhoads*, 391 F. Supp. 935 (E.D.Pa. 1975), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *McLean v. Alexander*, 449 F. Supp. 1251 (D.Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880 (D.N.J. 1984); *In Re National Smelting of New Jersey , Inc.*, 722 F. Supp. 152 (D.N.J. 1989). **Fourth Circuit: Court of Appeals** – *In Re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991). **District Courts** – *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 772 F. Supp. 1565 (D.S.C. 1991). **Fifth Circuit: Court of Appeals** – *Kuenhert v. Texstar Corporation*, 412 F.2d 700 (5th Cir. 1969); *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), *aff'd and rev'd in part on other grounds*, 459 U.S. 375 (1983). **District Courts** – *Marrero v. Abraham*, 473 F. Supp. 1271 (E.D.La. 1979); *In Re Terra-Drill Partnerships Securities Lit.*, 726 F. Supp. 655 (S.D.Tex. 1989). **Sixth Circuit: District Courts** – *Alexander Grant & Co. v. McAlister*, 669 F. Supp. 163 (S.D.Ohio 1987); *Baker v. BP America, Inc.*, 749 F. Supp. 840 (N.D.Ohio 1990).

found in three published opinions[4] and two unpublished opinions[5] holding to the contrary.

C. The Leading Cases Establishing A Right To Contribution Are Carefully Reasoned

Court decisions supporting the right of contribution under § 10(b) are thoughtful and reasoned. The judiciary did not cavalierly imply a new right of action without exploring the basis for the right.

In *deHuas*, the first case to imply a right of contribution under § 10(b), the court reasoned that contribution should be permitted when liability is implied under

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Seventh Circuit: Court of Appeals – *Madigan, Incorporated v. Goodman*, 498 F.2d 233 (7th Cir. 1974); *Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979). **District Courts** – *In Re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. 597 (N.D.Ill. 1987). **Ninth Circuit: Court of Appeals** – *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 232 (1990); *Smith v. Mulvaney*, 827 F.2d 558 (9th Cir. 1987). **District Courts** – *Ahern v. Gaussoin*, 104 F.R.D. 37 (D.Or. 1984); *Nelson v. Bennett*, 662 F. Supp. 1324 (E.D.Cal. 1987). **Tenth Circuit: District Courts** – *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540 (D.Colo. 1989), *appeal dismissed without opinion*, 936 F.2d 582 (10th Cir. 1991); *deHaas v. Empire Petroleum Company*, 286 F. Supp. 809 (D.Colo. 1968), *aff'd in part, rev'd in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970). **District of Columbia Circuit: District Courts** – *In Re National Student Marketing Litigation*, 517 F. Supp. 1345 (D.D.C. 1981).

[4] *Chutich v. Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992); *In re Professional Fin. Management, Ltd.*, 683 F. Supp. 1283, 1285-87 (D. Minn. 1988); *Robin v. Doctors Officenters Corp.*, 730 F. Supp. 122, 124-25 (N.D. Ill. 1989).

[5] *Nelsen v. Craig-Hallum, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) 94,500 at 93192-93193 (D. Minn. 1989); *Biben v. Card*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,512 at 92,331 n.2 (W.D. Mo. 1991).

§ 10(b) because contribution is explicitly authorized by the express civil liability provisions of the securities laws. *deHaas*, 286 F. Supp. at 815-16.[6]

In *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955, 957-58 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971), the next decision subsequent to *deHaas* to consider contribution under § 10(b), the court recognized that the general trend of current law was towards the allowance of contribution among joint tortfeasors, and thus followed *deHaas* in permitting a contribution action under § 10(b).

In *Heizer Corp. v. Ross*, 601 F.2d 330, 331-32 (7th Cir. 1979), the Seventh Circuit also upheld contribution under § 10(b). Relying in part on the existence of three other express contribution provisions in the securities laws, *Heizer Corp.* reasoned that such ancillary remedy should also be implied when the basic remedy was itself implied under § 10(b). In *Huddleston*, 640 F.2d at 557, the Fifth Circuit concluded that supporting contribution under § 10(b) promotes the objective of deterrence under the securities laws.

Thus, while this Court is properly examining herein the very recent dissent to the right of contribution, Respondents urge the Court to weigh the careful and deliberate efforts reflected in prior judicial determinations supporting the right of contribution under § 10(b).

A conservative approach to discarding such precedent is dictated not simply by the numerosity of judicial precedent, but further by the careful and deliberate nature of the reasoning reflected in that precedent.

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[6] These express contribution sections are Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f); Securities Exchange Act of 1934, §§ 9(e), 18(b), 15 U.S.C. §§ 78i(e), 78r(b).

II.

IN 1988, CONGRESS: (1) EXPLICITLY APPROVED JUDICIAL DEVELOPMENT OF RIGHTS OF ACTION UNDER § 10(b); (2) EXPLICITLY RATIFIED EXISTING COURT-MADE LAW ON § 10(b) (INCLUDING CONTRIBUTION); AND (3) EXPLICITLY DELEGATED TO THE COURTS "LEEWAY TO DEVELOP SUCH PRIVATE RIGHTS OF ACTION IN AN EXPANSIVE FASHION IN THE FUTURE."

A. *Herman & MacLean* Directs Examination Of Post-Enactment § 10(b) Legislative History

In *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), this Court expressly found that Congress' continuing oversight of the securities laws constitutes ratification of the entire bundle of rights recognized by the courts under § 10(b). This Court held that the express remedy under § 11 of the Securities Act of 1933 did not preclude defrauded purchasers from maintaining an implied action under § 10(b) of the Exchange Act. *Id.* at 387. This Court recognized that prior to the massive revision of the securities laws in 1975 by Congress, "federal courts had *consistently* and *routinely* permitted a plaintiff to proceed under § 10(b) even where express remedies under § 11 or other provisions were available." *Id.* at 384-85. "In light of this well-established judicial interpretation, Congress' decision to leave § 10(b) intact suggests that Congress *ratified* the cumulative nature of the § 10(b) action." *Id.* at 386 (emphasis added).

This reasoning was also followed in *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), the very case that Petitioners principally rely on regarding congressional intent.[7]

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[7] In rejecting a finding of a private right of action under § 17(a) of the Exchange Act, Chief Justice Rehnquist, then Justice Rehnquist, noted that unlike the private right of action under § 10(b) that had at that time been accepted for 25 years by the

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 355-56, (1982), this Court held that post-enactment legislative history must be examined in evaluating the scope of an implied right of action for fraud under the Commodity Exchange Act, a situation clearly analogous to the one at bar.

Merrill Lynch pointed out that this Court makes a different inquiry "when Congress acts in a statutory context in which an implied private remedy has already been recognized by the Courts" than "when Congress enacts new legislation." *Id.* at 378.

When new legislation is considered, the question is whether Congress intended to create a private remedy to supplement any express enforcement provisions of the statute. When examining congressional action under a statute already containing a judicially-recognized implied right of action, "the inquiry logically is different. *Congress need not have intended to create a new remedy, since one already exisied; the question is whether Congress intended to preserve the pre-existing remedy.*" *Id.* at 378-79 (emphasis added).

Merrill Lynch indicates that its reasoning applies to § 10(b).

> Although the consensus of opinion concerning the existence of a private cause of action under the CEA was neither as old nor as overwhelming as the consensus concerning Rule 10b-5, it was equally uniform and well understood.

Id. at 380.

The reasoning of *Herman & MacLean v. Huddleston* and *Merrill Lynch* indicates that: "[O]ur evaluation of Congressional action . . . must take into account its contemporary legal context." *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979). "It is always appropriate to

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federal courts, there was no similar history of longstanding lower-court interpretation of § 17(a). *Touche Ross* at 577 n.19.

assume that our elected representatives, like other citizens, know the law." *Id.* at 696-97.

Accordingly, we must examine the post-enactment legislative history of the Exchange Act, a subject strenuously avoided by Petitioners and their *Amicus*.

B. Congress Has Expressly Approved The Full Scope Of Implied Rights Under § 10(b)

In enacting the "Insider Trading and Securities Fraud Enforcement Act of 1988," one of the most comprehensive revisions of the securities laws, Congress explicitly approved the full scope of rights recognized by the courts under § 10(b), the process of court development of law under § 10(b), and private enforcement of rights under § 10(b).[8] Such approval is contained in the legislative history of that 1988 law, House Report (Energy and Commerce Committee) No. 100-910 dated September 9, 1988, Cong. Record Vol. 134 (1988)[9] [hereinafter "Legislative History"].

1. Approval Of Rights Under § 10(b), Including Contribution

The Legislative History explained that "case law . . . has developed over time" interpreting the securities laws. "Section 10(b) of the Exchange Act, along with Rule 10b-5 promulgated by the Commission, has been subject to the *most extensive judicial interpretation*." Legislative History at 8 (emphasis added). In the Legislative History, "[t]he Committee in fact expressly recognizes the

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[8] In part, the bill extended civil penalties under Exchange Act § 21(d) to "controlling persons" who fail to adequately prevent insider trading; created new Exchange Act § 15f; amended § 32 of the Exchange Act to increase maximum jail term and fines; and passed § 20A of the Exchange Act to codify a private right of action for "contemporaneous traders."

[9] No Senate report was submitted with this legislation.

implied right of action under the securities laws including but not limited to the [misappropriation] case." Legislative History at 28.

Section 20A(d) of the Exchange Act, 15 U.S.C. § 78t-1(d), passed as part of the 1988 legislation, explicitly preserved all implied rights of action under § 10(b), stating:

> Nothing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this title [the Exchange Act as a whole], or the availability of *any* cause of action implied from a provision of this title. (Emphasis added.)

When § 20A(d) was enacted, there were thirty-one cases supporting the right of contribution under § 10(b), and only one opposed. *See* footnotes 2 and 3, *supra*. Section 20A(d)'s explicit preservation of existing rights under § 10(b) provides direct and overwhelming evidence of legislative intent to preserve the implied right of contribution.

2. *Approval Of The Process Of Judicial Development Of Rights Under § 10(b)*

The Legislative History shows that Congress was relying on court-made law under § 10(b) to fulfill the purposes of the Exchange Act.

> In the view of the Committee, Section 10(b), Rule 10b-5, and other relevant provisions of the Exchange Act have sufficient flexibility to recognize and protect any person defrauded or harmed by a violation of any provision of this title [i.e. the entire Exchange Act] or the rules or regulations thereunder. . . .

Id. at 27.

In fact, Congress deleted an express right of action from the 1988 legislation which was redundant in light of the scope of § 10(b). This deletion was made to avoid restricting the scope of implied rights or freezing further court development of such rights:

> The Committee's intention in this amendment [deleting the express right] was to avoid creating an express private cause of action which might have the unintended effect of freezing the law *or in any way restricting the potential rights of action which have been implied by the courts in this area. Rather, the Committee wanted to give[n] [sic] the courts leeway to develop such private rights of action in an expansive fashion in the future.*

Ibid. (emphasis added).

Thus, Congress specifically approved judicial development of rights under § 10(b).

3. *Approval Of Private Enforcement Of Rights Under § 10(b)*

The Legislative History noted that "private rights of action have traditionally served as an important supplement to the Commission's enforcement of the federal securities laws," *Id.* at 26, quoting with approval then-SEC chairman Ruder, and stated that *"the Committee wanted to give[n] [sic] the courts leeway to develop such private rights of action in an expansive fashion in the future."* *Id.* at 27 (emphasis added). Thus Congress has approved enforcement of the § 10(b) prohibition of fraud through private actions.

C. Active Congressional Oversight Indicates Approval Of Judicial Interpretation Of The Securities Laws, Unless Limited By Congressional Amendment

Given the close congressional oversight of the securities laws, as well as the Legislative History cited above showing congressional intent to preserve judicial rulings under those laws, it would contravene congressional intent to limit the right of contribution under § 10(b). Such close congressional oversight is indicated both by legislative enactments, and Legislative History indicating congressional scrutiny of judicial decisions under the securities laws.

During the many years in which contribution has been a well-settled right under § 10(b), Congress has considered and passed ten major legislative amendments to the Exchange Act containing § 10(b).[10]

These many amendments indicate continuing congressional oversight of the securities laws. As problems arose, Congress responded. When tender offers became prominent, for example, Congress passed the Williams Act to regulate tender offers. The Market Reform Act of 1990, addressing problems of volatility in the securities

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[10] The major revisions of the Securities Exchange Act of 1934 during the period 1968 to the present, are:

1. P.L. 90-439 (1968): Williams Act to regulate tender offers;

2. P.L. 91-567 (1970): Williams Act amendment gives SEC regulatory authority under § 14(e) to define and proscribe fraudulent practices;

3. P.L. 94-29 (1975): Securities Acts Amendments of 1975 – provides for national market system for securities; provisions related to self-regulation of exchanges, municipal securities, regulation of clearing agencies and transfer agents;

4. P.L. 95-213 (1977): Foreign Corrupt Practices Act of 1977 – penalties to issuers who engage in foreign corrupt practices;

5. P.L. 98-376 (1984): Insider Trading Sanctions Act of 1984 – increases sanctions against insider trading;

6. P.L. 99-571 (1986): Government Securities Act of 1986 – provides for regulation of broker-dealers in government securities;

7. P.L. 100-704 (1988): Insider Trading and Securities Fraud Enforcement Act of 1988 – Provides private right of action based on contemporaneous insider trading;

8. P.L. 101-429 (1990): Penny Stock Reform Act – regulation of penny stock issuers and dealers;

9. P.L. 101-432 (1990): Market Reform Act of 1990 – permits SEC to suspend trading for protection of investors, and to limit practices which result in market volatility;

10. P.L. 102-242 (1991): Special statute of limitations provision for cases filed pre-*Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773 (1991).

markets, was a direct response to the 1987 stock market crash.

Congressional oversight of the securities laws extended to legislative review of judicial decisions under those laws. For example, the Legislative History of the Insider Trading and Securities Fraud Enforcement Act of 1988 reflects that the legislation was aimed in part at confirming the validity of the "misappropriation" theory of insider trading, because of judicial uncertainty in applying that principle.

The Legislative History of the 1988 act was very specific in its discussion of judicial precedent. It discussed two Supreme Court cases which narrowed the breadth of the statutory and regulatory framework for insider trading (Legislative History at 10) and then focused on *Carpenter v. United States*, 484 U.S. 19 (1987), in which this Court divided in a 4-4 vote regarding the "misappropriation" theory of insider trading.

The Legislative History concluded that the misappropriation theory "should be encompassed within § 10(b) and Rule 10b-5," (*Id.* at 9-10), and pointed out that codification of the misappropriation theory was intended to overturn court cases precluding that theory of recovery. *Id.* at 26.

Congressional oversight indicates congressional awareness of the right of contribution and other implied rights under § 10(b).[11]

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[11] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it enacts a statute without change . . . . [cases omitted.] So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Merrill Lynch*, 456 U.S. at 382 quoting *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978).

Such congressional oversight further indicates approval of the right of contribution under § 10(b). Congress was deemed to have approved an implied cause of action under the Commodities Exchange Act, by enacting legislation in the "contemporary legal context" of that implied right (*Merrill Lynch*). *A fortiori*, Congress has approved the right of contribution under § 10(b) by its continuing legislative oversight and enactments in the "contemporary legal context" of the securities laws, including contribution. (*See* footnote 10, *supra*).

Moreover, Congress has never even considered, much less enacted, any measures to overturn the § 10(b) implied right of contribution under long-established, well-settled case law. Therefore, congressional intent, as expressed in its expansive reading of § 10(b), would be contravened by limitations on contribution.

III.

THE LEGISLATIVE SCHEME UNDER THE EXCHANGE ACT, INCLUDING THE EXPRESS CONTRIBUTION PROVISIONS THEREIN, IMPLIES A RIGHT OF CONTRIBUTION UNDER § 10(b)

A. Factors To Analyze In Ascertaining The Legislative Scheme

In addition to congressional intent (as discussed in Section II of this Brief), the courts should examine the following factors in order to ascertain whether the legislative scheme supports recognition of an implied right of action:

> The language of the statute itself, . . . the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or supplement existing state remedies.

Northwest Airlines at 91, citing *Cort v. Ash* 422 U.S. 66 (1975).

Analysis of these factors in connection with the Exchange Act indicates that the congressional scheme underlying the act supports a right of contribution under § 10(b).

B. The Express Statutory Language Indicates An Intent To Imply Contribution For Rights Of Action Involving Scienter

The Securities Act provides for contribution among joint wrongdoers in § 11(f), 15 U.S.C. § 77k(f). The Exchange Act so provides in § 9(e), 15 U.S.C. § 78i(e), and § 18(b), 15 U.S.C. § 78r(b).[12] In interpreting the implied right of action under § 10(b) this Court looks to such analogous express rights in the securities acts. *See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773, 2780 (1991), applying express statute of limitations provisions of Exchange Act §§ 9 and 18 to determine the limitations period under § 10(b).

Just as Exchange Act §§ 9 and 18 were applicable to the statute of limitations for § 10(b) actions (*see Lampf, supra*), those sections, along with Securities Act § 11(f), are applicable to confirm the existence of a right of contribution under § 10(b).

Furthermore, all of these securities law express contribution sections permit wrongdoers, *who knowingly or recklessly commit fraud*, to obtain contribution.[13] Thus, the argument in Petitioners' brief (at p. 20) that wrongdoers are not intended to "benefit" from the securities laws is

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[12] The Securities Act and the Exchange Act can be examined in conjunction in order to discern congressional intent behind the securities laws, since they "constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 (1976). A cumulative construction of the securities laws also effectuates their broad remedial purposes. *Herman & MacLean*, 459 U.S. at 386.

[13] While Securities Act § 11 allows liability for conduct that is merely negligent, its contribution provision expressly prohibits a person guilty of fraudulent misrepresentation from recovering contribution from any person not guilty of such conduct. However, a person guilty of fraudulent misrepresentation could clearly obtain contribution from another who is guilty of the same conduct.

mistaken, as well as misleading. Wrongdoers with scienter can "benefit" under the explicit contribution sections of the securities laws.

As discussed below in Section III(C), however, the congressional intent was not to "benefit" wrongdoers, but to deter wrongdoing by facilitating the process of bringing all wrongdoers to justice through contribution. Congress determined that the benefits of contribution under the legislative scheme of the securities laws outweighs the drawbacks of ameliorating liability of wrongdoers.

C. The Underlying Statutory Purposes To Protect The Securities Markets And Deter Wrongdoing Support A Right Of Contribution

Deterrence of wrongdoing through contribution protects the securities markets, and thus supports the statutory scheme of the securities laws.

In fact, this Court has already recognized that suits between wrongdoers under the securities laws supports the goals of the underlying statutory scheme.[14] As stated in *Pinter v. Dahl*, 486 U.S. 622, 636 (1988):

> Refusal of relief to those [who are at fault, but] less blameworthy would frustrate the purpose of the securities laws; it would not serve to discourage the actions of those most responsible for organizing forbidden schemes; and it would sacrifice protection of the general investing public in pursuit of individual punishment.

1. Section 10(b) Is Aimed At Deterrence

The purpose of the Exchange Act is to ensure the integrity of the securities markets, not merely to protect individual investors. The language of § 10(b) itself provides that it is not only to "protect investors," but also to protect the "public interest."

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[14] *See* discussion regarding *in pari delicto* cases below at Section V of this Brief.

Thus, § 10(b) mandates:

> [A] careful balancing of competing interests . . . "the term 'public interest' . . . requires the Commission . . . to take into consideration the welfare of the economy as a whole" . . . the SEC "must be careful not to erect such burdensome requirements as to discourage the raising of the capital necessary to the growth of business and industry."

Daugherty, *Rethinking the Ban on General Solicitation*, 38 Emory L. J. 67 n.107 (1989), quoting Gadsby, *The Securities and Exchange Commission and the Financing of Small Businesses*, 14 Bus. Law. 144, 145 (1958).

Deterrence is the tool used by the Exchange Act to protect the securities markets. "[T]he Securities Act is more concerned with prevention than cure." *Globus v. Law Research Service, Inc.*, 418 F.2d 1276, 1289 (2d Cir. 1969); "[T]he main objective of the federal securities laws is to deter future misconduct rather than compensate the injured party." *In re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. 597, 610 (N.D.Ill. 1987).

2. Congress Intended Contribution To Promote Deterrence

Contribution is aimed at deterrence of wrongdoers.

> Recognition of the right [to contribution] reflects the view that when two or more persons share responsibility for a wrong, it is *inequitable* to require one to pay the entire cost of reparation, and it is sound policy to *deter* all wrongdoers by reducing the likelihood that any will entirely escape liability.

Northwest Airlines, 451 U.S. at 88 (emphasis added).

Furthermore, in the context of § 10(b) the deterrence of bringing all wrongdoers to court through contribution is not substantially lessened by allowing wrongdoers to reduce their liability through contribution. This is because in § 10(b) suits defendants generally face huge

potential liability even if reduced by contribution. Adamski, *Contribution and Settlement in Multiparty Actions under Rule 10b-5*, 66 Iowa L. Rev. 533, 540-41 (1981) [hereinafter *Adamski*].[15]

Thus, the Exchange Act's statutory scheme of deterrence supports the right of contribution under § 10(b).

D. Statutory Authorization Of Contribution "As In Cases Of Contract" And Contractual Underpinnings Of The § 10(b) Action Support A Right Of Contribution

Contribution has traditionally been permitted in contract actions at common law, regardless of its traditional limitations in tort law. Ruder, *Multiple Defendants in Securities Fraud Cases: Aiding and Abetting, Conspiracy,* In Pari Delicto *Indemnification, and Contribution*, 120 U. Pa. L. Rev. 597, 647 (1972) [hereinafter *Ruder*]. The contractual basis for the explicit rights of contribution under the securities laws, plus the contractual underpinnings of the § 10(b) private right of action, thus support a right of contribution under § 10(b).

The explicit contribution provisions in Securities Act § 11(f), 15 U.S.C. § 77k(f), and Exchange Act § 9(e), 15 U.S.C. § 78i(e), and § 18(b), 15 U.S.C. § 78r(b), all contain the key phrase "may recover contribution as in cases of contract." While at common law, contribution in cases of

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[15] "In actions under section 10(b), particularly class actions involving open market trading, the amount of potential damages is difficult to predict and, because of the likelihood of numerous plaintiffs, will generally involve substantial sums of money [fn. omitted]. Thus, it appears unlikely that a potential violator of Rule 10b-5 would discount even a remote possibility of liability for total damages as a small loss. On balance it seems that the court's allowance of contribution, which thus provides a more probable threat of liability even though for only a portion of total damages, better serves the deterrent purposes of the securities laws than would a rule prohibiting contribution." *Adamski* at 540-41.

contract was allowed, no contribution right was held to exist among tortfeasors. *Ruder* at 647. Thus, Congress drew from contract law, and intended to create a framework in the securities laws where contribution would be permissible as in contract law.

The § 10(b) private right of action is itself based, in part, on the *contractual rights* of the parties to a purchase and sale of securities. "One of the justifications advanced for implication of a cause of action under § 10(b) lies in § 29(b) of the 1934 Act, 15 U.S.C. § 78cc(b), providing that a contract made in violation of any provision of the 1934 Act is voidable at the option of the deceived party." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 735 (1975). It is this contractual nature of the § 10(b) right of action that limits the right to purchasers and sellers of securities. *Ibid.*

Since the § 10(b) right of action is contractual in nature, the traditional right of contribution applicable to contract actions should also apply under § 10(b).

E. Congress Intended To Create An Independent Federal Regulatory Scheme Under The Securities Laws, So The Existence Of State Remedies Does Not Limit Federal Contribution

Section 10(b) and its companion antifraud provisions under the federal securities laws are part of a distinct statutory scheme to expand the common law. "[T]he typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b-5 is applicable." *Blue Chip Stamps*, 421 U.S. at 744-45. "Indeed, an important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common-law protection by establishing higher standards of conduct in the securities industry." *Huddleston*, 459 U.S. at 389.

"All [the securities law antifraud provisions] are designed to fill a void in the common law and to create remedies that would be uniform throughout our nation's

commercial universe instead of being subjected to the vagaries of independent and diverse state statutory regulations." *Davis v. Birr, Wilson & Co., Inc.*, 839 F.2d 1369, 1375 (9th Cir. 1988) (Aldisert concurring).

Thus, the implied right of contribution under § 10(b) is necessary to complete the federal statutory scheme under the securities laws, regardless of any right to contribution under common law.

Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977), is therefore misleadingly cited by Petitioners' *Amicus* for the proposition that a private action should not be implied under the securities laws where unnecessary to their purposes. *Santa Fe* held it was improper to federalize a cause of action for breach of fiduciary duty to override state corporations law. *Id.* at 478-79.

In this case, the Court is not being asked to federalize state law, but to recognize contribution under § 10(b) as part of the distinctly federal framework of the securities laws.

IV.

NORTHWEST AIRLINES AND *TEXAS INDUSTRIES* ARE NOT CONTROLLING: THE SECURITIES LAWS, UNLIKE THE CIVIL RIGHTS AND ANTITRUST LAWS CONSIDERED IN THOSE CASES, REQUIRE IMPLIED CONTRIBUTION IN ITS STATUTORY SCHEME

Northwest Airlines[16] and *Texas Industries*[17] clearly are not controlling herein, since the statutes involved in those cases *unlike the Exchange Act*, (1) do not contain any explicit contribution provisions, and (2) never gave rise to well-settled precedent supporting a right to contribution. Not only are *Northwest Airlines* and *Texas Industries*

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[16] *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981).

[17] *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

not controlling, but as explained below, the reasoning of those cases actually supports a right of contribution under § 10(b).

A. The Holdings Of *Northwest Airlines* And *Texas Industries* Should Be Confined To The Statutory Schemes Considered Therein

1. *Implied Contribution Is Still Recognized Under Other Statutory Schemes*

The simplistic view that *Texas Industries* and *Northwest Airlines* mandate rejection of every implied right of contribution in the face of statutory silence is simply wrong. For example, in *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1985), Judge Posner specifically held that there was a right of contribution among ERISA plan fiduciaries sued by plan members or beneficiaries, notwithstanding the absence of an express authorization for a contribution action in the text of the statute.

Thus, as discussed in the cases subsequent to *Texas Industries* and *Northwest Airlines* upholding the right of contribution under § 10(b) (as discussed in Section IV(D) below), the holdings of *Texas Industries* and *Northwest Airlines* should be confined to the statutory schemes specifically considered therein.

2. *Since § 10(b) Involves An Implied Right Of Action, We Look To The Statutory Scheme To Analyze Contribution*

While express statutory rights of action may require express contribution rights, express wording in support of contribution is certainly not required for implied actions. In fact, it would be "incongruous" to look for such express wording for an implied right. *In re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. at 616.

The general approach of *Texas Industries* and *Northwest Airlines* – that if Congress had wanted a right of contribution, they would have so provided – may be

suitable for the explicit rights of action considered therein, but is inappropriate in the context of an implied right such as that under § 10(b). *Id.* at 615, 616.

Similarly, Petitioners' argument that there is no "textual" support for the implication of a right of contribution under § 10(b) (Petitioners' Brief pp. 19-20) is invalid, because the § 10(b) right of action is itself implied, and non-"textual." Thus, such "textual" support for the right of contribution, in the sense of specific wording in § 10(b) itself, would be improbable, given that Congress never even considered a private right of action when originally enacting that section.[18]

The error of requiring specific statutory wording in the § 10(b) context was noted in *Blue Chip Stamps*, 421 U.S. at 737, stating "it would be disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present state of the law with respect to Rule 10b-5." Similarly this Court recognized again last year the nontraditional origins of the § 10(b) cause of action noting that it made no pretense that it was Congress' original intent to provide the remedy afforded. *Lampf, Pleva, Lipkind, Prupis & Petigrow*, 111 S. Ct. at 2780.

A failure to include a right of contribution in a statute providing for an *express* private right of action may indicate Congress' desire not to include such a remedy, but in the case of an *implied* private right of action, such conclusion would be in error. *In re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. at 616.

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[18] Congress has, however, ratified court law regarding the private rights of action under § 10(b), including the right of contribution, as discussed in Section II of this Brief.

B. The Securities Laws Scheme, Unlike The Statutes In *Northwest Airlines* And *Texas Industries*, Explicitly Allows Wrongdoers To Obtain Contribution For Purposes Of Deterrence

1. *The Securities Laws' Explicit Contribution Provisions Show Wrongdoers Can Sue In Order To Promote Deterrence*

The explicit securities laws contribution provisions show that Congress intended to enable wrongdoers guilty of scienter to sue for contribution under those statutes.

In contrast, *Northwest Airlines* and *Texas Industries* ruled against contribution under statutes containing no express contribution provisions whatsoever.

Thus the reasoning in those cases that the parties seeking contribution could not obtain it because not within the class protected by the statutes therein,[19] and Petitioners' analogous argument that wrongdoers are not entitled to "benefit" under the securities laws, is inapplicable to this case. The express contribution sections of the securities laws show that wrongdoers with scienter can benefit from contribution under the securities laws.[20]

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[19] *Northwest*, emphasized that Title VII of the civil rights laws was enacted solely to establish statutory rights of employees vis-a-vis their employers, and held that employer *Northwest* would not be a "beneficiary" under the statute and was thus barred from seeking contribution. *Northwest* at 91-95.

Similarly, *Texas Industries* held that the treble damages provisions of the antitrust laws indicated an intent to punish, not to ameliorate the liability of wrongdoers. Thus, it refused to imply a right of contribution under those laws. *Texas Industries* at 639.

[20] The holding in *Chutich v. Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992) which has caused the divergence among the circuits leading to this appeal, is fully based on the holdings of *Texas Industries* and *Northwest Airlines*, and adds nothing to the reasoning of those cases. Accordingly, *Chutich* is rebutted through the discussions of those cases herein, but is not separately discussed.

2. *Absence Of Punitive Damages Under § 10(b) Shows A Design To Deter, Not Punish, In Contrast To Antitrust's Treble Damages*

Since the securities laws lack punitive damage provisions and are intended to deter rather than punish, contribution under § 10(b) is proper.

Texas Industries, 451 U.S. at 639, emphasized that the treble damages provisions of the antitrust statute cut against permitting contribution under that law, stating "[t]he very idea of treble damages reveals an intent to punish past, and to deter future unlawful conduct, not to ameliorate the liability of wrongdoers."

Punitive damages are impermissible under the Exchange Act, as provided in 15 U.S.C. § 78bb(a).[21] Punitive damages have been specifically disallowed under § 10(b). *deHaas; Huddleston*, 640 F.2d at 559; *Petrites v. J.C. Bradford & Co.*, 646 F.2d 1033, 1036 (1981).

Thus, unlike the antitrust laws under which *Texas Industries* ruled contribution improper, the securities laws are not based on intent to punish, but to deter, and they explicitly provide for contribution as a means to that end.

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[21] "[N]o person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of." 15 U.S.C. § 78bb(a).

3. *The Argument That Wrongdoers Should Not "Benefit" From Contribution Is A Red Herring: Congress Has Determined That The Benefits Of Contribution In Promoting Deterrence Outweigh Any Drawbacks Of Benefitting Wrongdoers*

The argument that wrongdoers should not be permitted to "benefit" from the securities laws is misleading. Respondents are not arguing that wrongdoers should so benefit. Instead, Respondents contend that the usefulness of contribution in furthering the policy of deterrence *outweighs* any drawbacks of benefitting wrongdoers by ameliorating their liability.

As discussed in Section III(C) above, the explicit contribution sections in the securities laws reflect a legislative determination that any benefit provided to wrongdoers by contribution is more than offset by the protection contribution affords to the securities markets, through its deterrent effect.

C. Unlike The Statutes Considered In *Northwest Airlines* And *Texas Industries*, The Securities Acts Are Not Comprehensive, Which Is Why A § 10(b) Remedy Is Implied

Since the securities laws are not comprehensive, and use implied rights under § 10(b) and other sections to fill the interstices of the statutory scheme, this Court's rejection of rights to contribution in considering other, more comprehensive statutory schemes, is inapplicable here.

Northwest Airlines and *Texas Industries* reasoned that the statutory schemes considered there were comprehensive in nature, so that further private rights of action, such as a right to contribution, could not be implied.

In *Northwest Airlines* this Court noted, "The comprehensive character of the remedial scheme expressly fashioned by Congress [under the Equal Pay Act and Title VII] strongly evidences an intent not to authorize additional remedies" such as contribution. *Northwest Airlines*, 451 U.S. at 93-94.

Similarly, in *Texas Industries* this Court held that the detailed and specific treble damages provisions of the antitrust laws showed that Congress had enacted a comprehensive legislative scheme with an integrated system for enforcement, and deliberately omitted a right to contribution from that scheme. *Texas Industries*, 451 U.S. at 640-45.

Under the securities laws, in contrast, it is uniformly acknowledged by this Court that Congress did not enact a comprehensive scheme, so that implied rights of action, including the implied right of action under § 10(b) and SEC Rule 10b-5, are needed to close gaps in that scheme. "Rule 10b-5 was adopted in order to close 'a loophole in the protection against fraud . . . by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase.' See SEC Release No. 3230 (May 21, 1942); remarks of Milton Freeman, Conference on Codification of the Federal Securities Laws, 22 Bus. Law. 793, 922 (1967)." *Blue Chip Stamps*, 421 U.S. at 736 n.8.

Since the express federal securities law scheme is not completely comprehensive, the reasoning applied in *Northwest Airlines* and *Texas Industries* regarding such comprehensive schemes is inapplicable to contribution under § 10(b).

D. A Number Of The Post-*Northwest Airlines* And *Texas Industries* Cases Have Specifically Held That Those Cases Do Not Limit Contribution Under § 10(b)

Not only has the overwhelming weight of case law since *Northwest Airlines* and *Texas Industries* supported

contribution under § 10(b) (*see* footnote 3, *supra*), a number of significant cases have specified that the holdings of *Northwest Airlines* and *Texas Industries* do not limit contribution under § 10(b).

In Re National Student Marketing Litigation, 517 F. Supp. 1345, 1348 (D.D.C. 1981) held that the defendant could not rely on *Texas Industries* and *Northwest Airlines* to limit contribution under § 10(b), because the holdings of those two cases applied only to the two statutory schemes therein.

Noonan v. Granville-Smith, 532 F. Supp 1007, 1008 (S.D.N.Y. 1982), *opinion supplemented* by 535 F. Supp. 333 (S.D.N.Y. 1982), rejected the argument that the Second Circuit precedent supporting contribution under § 10(b) had to be disregarded in light of *Texas Industries* and *Northwest Airlines*. Similarly, see *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880, 885 (D.N.J. 1984).

Most recently, *Baker v. BP America, Inc.*, 749 F. Supp. 840 (N.D. Ohio 1990) rejected the argument that *Northwest Airlines* and *Texas Industries* foreclosed the implied right of contribution under § 10(b), noting that the express statutory remedies therein were different than the legislative scheme provided by the securities laws.

Thus, the weight of precedent rejects Petitioners' reliance on *Northwest Airlines* and *Texas Industries*.

V.

THIS COURT HAS ALREADY DETERMINED, IN LIMITING THE *IN PARI DELICTO* DEFENSE, THAT SUITS BETWEEN WRONGDOERS ARE PERMISSIBLE, AND SERVE IMPORTANT PURPOSES UNDER THE SECURITIES LAWS

A. Contribution Should Be Permissible For Suits Between Culpable Parties As Set Forth By This Court's *In Pari Delicto* Precedents

The right of contribution is the flip side of the *in pari delicto* defense, since both involve suits between culpable parties. "[T]he common-law rule against contribution

from co-conspirators . . . was grounded on the premise that parties generally *in pari delicto* should be left where they are found." *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 316 n.28 (1985).

This Court's limiting of the *in pari delicto* defense under the securities laws, because suits between culpable parties will "best promote the primary objective of the federal securities laws" (*Bateman*, 472 U.S. at 315), supports the right of contribution under § 10(b).[22] Any further limitation on suits between wrongdoers – through a separate limitation on contribution actions, would only limit suits already determined in *Bateman* and *Pinter* to be useful and proper.

B. This Suit Furthers The Purposes Of Actions Between Wrongdoers Approved In *Bateman*

1. *Contribution Suits Expose Wrongdoing Among Insiders Which Would Otherwise Go Undetected*

Suits between wrongdoers "will best promote the primary objective of the federal securities laws – protection of the investing public and the national economy through the promotion of 'a high standard of business ethics . . . in every facet of the securities industry.'" *Bateman*, 472 U.S. at 315.

> Such suits are necessary to ferret out wrongdoers.
>
> [B]arring private actions in cases such as this would inexorably result in a number of alleged fraudulent practices going undetected by the authorities and unremedied. . . . [I]t is particularly important to permit "litigation among guilty parties [that will serve] to expose their unlawful conduct and render them more easily

[22] While *Bateman* was a suit between a tipper and tippee, this Court stated that "*Bateman* provides the appropriate test for allowance of the *in pari delicto* defense in a private action under any of the federal securities laws." *Pinter*, 486 U.S. at 635.

> subject to appropriate civil, administrative, and criminal penalties."

Ibid.

Private insider advice is difficult for an outsider to uncover, especially when subject to attorney-client privilege.[23]

Moreover, suits between culpable parties deter the insiders most responsible for fraud. As stated in *Bateman* albeit in the insider trading context, "we believe that deterrence of insider trading most frequently will be maximized by bringing enforcement pressures to bear on the sources of such information – corporate insiders and broker-dealers." *Id.* at 316. Enforcement of the securities laws depends on lawyer and accountant insiders, such as the defendants herein, giving appropriate counsel to issuers. Corporate insiders are "more responsive to the deterrent pressure of potential [securities law] sanctions *[precisely because] they are more likely than ordinary investors to be advised by counsel and thereby to be informed fully of the allowable limits on their conduct*" (emphasis added). *Id.* at 317. Thus, deterring fraud by lawyers and accountants is crucial.

2. *This Suit Illustrates The Important Purposes Served By Contribution Suits Under The Securities Acts*

This suit uncovers wrongdoing of professional advisers – lawyers and accountants – which would have been undetected if not for this suit. Also, the defendant

[23] Obtaining evidence in discovery which is covered by the attorney-client privilege, under the fraud exception to that privilege, requires making a *prima facie* case that the fraud exists, a threshold showing which may prove impossible to an outsider. *See, e.g., In Re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987), requiring such a *prima facie* showing.

lawyers and accountants herein were those most responsible for the fraud. Dependence on such advisors is particularly clear in this case, involving compliance with technical, but important, securities law requirements.[24]

C. This Suit Meets This Court's Criteria For Permitting Suits Between Wrongdoers, As Set Forth In The *In Pari Delicto* Cases

1. *The* Bateman *Two-Pronged Test For Suits Between Culpable Parties*

Under *Bateman*, the *in pari delicto* defense can block suits between culpable parties "only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public." *Bateman*, 472 U.S. at 310.

Accordingly, such suits should be permitted in a contribution context where (1) the defendant "bears at least substantially equal responsibility for the violations," and (2) the suit would promote enforcement of the securities laws and/or protection of the investing public. This case meets both prongs of this test.

2. *The First Prong Of The Test Is Met: Petitioners Bear Primary Responsibility For The Violations*

The first prong of the *Bateman* test requires that the culpable defendant "must be an active, voluntary participant in the unlawful activity. . . . [C]ourts frequently have

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[24] *See, e.g.*, First Amended Complaint ¶¶33(a) and 33(b) at J.A. pp. 18-19, referencing SEC regulations concerning disclosure of risk factors in the public offering, and First Amended Complaint ¶40 at J.A. pp. 27-8, referencing SEC and Generally Accepted Accounting Principles requirements for disclosure of a change in accounting method for revenue recognition.

focused on the extent to which the plaintiff and the defendant cooperated in developing and carrying out the scheme" violating the securities act. *Pinter*, 486 U.S. at 636.

Clearly, scienter is a major, if not the principal, criterion for evaluating blameworthiness. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212 (1976). Herein, Cousins' accountants and attorneys were primarily responsible for advising Cousins on legal requirements for its public offering, and thus had a level of scienter which the issuer itself could not have had. (Complaint ¶¶31-2 at J.A. pp. 17-19; ¶¶34-6 at J.A. pp. 23-5.)[25]

Even assuming the Cousins corporate insiders knew the undisclosed facts, they could not have known the applicable disclosure requirements which their lawyer and accountant advisors knew, or should have known. *Thus, the lawyer and accountant defendants are at least as culpable as the Plaintiffs' subrogors – the Cousins entity and corporate insiders.*

3. *The Second Prong Is Met*

Preclusion of this suit would impede both major policies under the federal securities acts: protection of investors and protection of the integrity of the securities markets.

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[25] In conjunction with that Cousins offering, the attorney defendants (i.e. the Musick firm, Castro and Schuchard) "actively concealed and failed to disclose or caused the failure to disclose, or caused to be misrepresented or concealed" various matters in violation of specific SEC regulations (Complaint ¶33 at J.A. pp. 19-23).

Similarly, in connection with that same Cousins offering, the accountant defendants (i.e. Main and Cohn) "assisted MUSICK in the preparation and filing of the COUSINS Prospectus and, as a result of their participation and investigation into the business operations and prospects and financial, accounting and management controls and systems of COUSINS, knew or recklessly disregarded the false and misleading nature of the financial information contained in [the] COUSINS prospectus." (Complaint ¶36 at J.A. pp. 24-5.)

The only possible liability of the subrogors was vicarious, through imputation to them of the conduct of their lawyers and accountants. As continually maintained by plaintiffs, it was Cousins' attorneys and accountants who knowingly or recklessly violated legal requirements.

The securities laws were aimed at "establishing higher standards of conduct in the securities industry." *Herman & MacLean*, 459 U.S. at 288-89. Since attorneys and accountants play an ongoing role in issuance of securities, private enforcement actions against them are crucial.

Moreover, in this case, Cousins and its lawyers and accountants all owed a duty to the investing public, but the lawyers and accountants also owed Cousins various fiduciary duties.[26] Blocking suits between culpable parties is inappropriate where the culpable defendant owed a fiduciary duty to the plaintiff[27]. *Bateman*, 472 U.S. at 306. Fraud in the securities industry is "particularly egregious when committed by a securities professional, who owes a duty of honesty and fair dealing toward his clients." *Id.* at 314. Thus, deterring such egregious conduct, through this lawsuit, clearly furthers the public interest.

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[26] Compare *Bateman*, where the tippee was permitted to sue the tipper providing insider information, in part because the tipper had "a broader range of potential violations" than the tippee. Although the tipper and the tippee were both potentially liable for defrauding the investing public, the tipper was also responsible for breach of fiduciary duty to the issuer and for defrauding the tippee. *Bateman*, 427 U.S. at 313.

[27] This Court noted that "a confidential relationship between" the parties would determine their "relative standing" before the court, so that although both culpable, the parties would not be considered, in relation to each other, *in pari delicto*. *See, Bateman*, 472 U.S. at 306, citing 3 J. Pomeroy, *Equity Jurisprudence* § 942a, p. 741 (5th Ed. 1941).

VI.

POLICY CONSIDERATIONS SUPPORT THE IMPLICATION OF THE RIGHT OF CONTRIBUTION UNDER § 10(b)

A. Policy Support For The Right Of Contribution Should Be Considered

This Court consistently holds that policy should be considered in ruling on the scope of the private right of action under § 10(b). As noted in *Blue Chip Stamps*, "[i]t [was] therefore proper that we consider, in addition to the factors already discussed, what may be described as *policy considerations* when we come to flesh out the portions of the law with respect to which neither congressional enactment nor the administrative regulations offer conclusive guidance." *Blue Chip Stamps*, 421 U.S. at 737 (emphasis added).

Thus, this Court should consider that the policies underlying the securities laws strongly support upholding contribution under § 10(b).

B. Contribution Promotes The Deterrent Effect of the Securities Laws

Not only did Congress intend deterrence as the goal of contribution (as discussed in Section III(C) above); as a matter of policy, contribution does, in fact, promote deterrence.

Courts, commentators, and most modern studies have concluded that increasing the *certainty* of punishment, as contribution does, deters wrongdoing more effectively than increasing the *severity* of punishment – the effect of a "no contribution" rule. Langmore and Prentice, *Contribution Under Section 12 of the Securities Act of 1933: The Existence and Merits of Such a Right*, 1991 Emory L.J. 1015, 1074, 1074 n.304 (1991) [hereinafter *Langmore and Prentice*]; *Adamski* at 540. Without contribution, wrongdoers would gamble on the possibility of escaping liability entirely.

C. A Right of Contribution Promotes Fairness

As discussed in Section I. above, when the doctrine of contribution steadily replaced the no-contribution rule in Western law, "fairness" was the main rationale for the adoption of the new rule. *Huddleston*, 640 F.2d at 557.

There are many reasons why the doctrine of contribution is considered "fair." First, as this Court noted in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975), equitable considerations in allocating damages require that liability be assessed according to proportional fault. Similarly, fundamental fairness requires that the financial damage caused by joint tortfeasors be apportioned among them. *Adamski* at 541, citing *e.g., Heizer Corp.*, 601 F.2d at 333; *McLean v. Alexander*, 449 F. Supp. 1251, 1266 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979).

Although fairness dictates that liability be assessed according to fault, joint and several liability threatens defendants with liability for a disproportionate amount of the plaintiff's damages. Contribution avoids this unfairness. *McKinnon v. City of Berwin*, 750 F.2d 1383, 1387 (7th Cir. 1985).[28]

Second, contrary to the assertion of Petitioners and their *Amicus* that fairness should only benefit victims of a fraud, concepts of justice, which involve equality, are violated when several persons are involved in causing the same injury, but only one bears the total loss. Turck, *Contribution Between Tortfeasors in American and German Law – A Comparative Study*, 16 Tul. L. Rev. 1, 10 (1966). Adopting such a rule would produce the irrational result of compelling one or more defendants, who may not have been the primary instigators of the fraud, to bear the

[28] Judge Posner explained in *McKinnon*, 750 F.2d at 1387, an action brought pursuant to 42 U.S.C. § 1983, "the whole point of contribution is to mitigate the effect of joint and several liability, which allows liability to fall disproportionately on one or some group of joint tortfeasors."

entire loss, allowing more culpable wrongdoers to escape liability completely. *Adamski* at 541. The unfairness is exacerbated when a corporate tortfeasor is required to pay the total damages, since then the entire burden of payment would fall on the shareholders. *Ibid.*

> There is an obvious lack of sense of justice in a rule which permits the entire burden of a loss, for which two defendants were equally unintentionally responsible to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.

Skinner v. Reed-Prentice Division Package Machinery Co., 70 Ill. 2d 1, 374 N.E. 2d 437, 442 (Ill. 1978).

Third, there is no justice in tortfeasors escaping liability for a wrong caused by their conduct. *Langmore and Prentice* at 1062.

Fourth, without contribution the parties who will pay the entire burden and those who will escape may be chosen by the plaintiff, through whim, oversight, or collusion with other wrongdoers, and thus would be an arbitrary and unfair manner in which to redress violation of § 10(b). *Adamski* at 541-42 citing *Heizer Corp.*, 601 F.2d at 333.

Finally, contribution has been likened to comparative negligence, which has effects similar to contribution. The primary rationale for the overwhelming adoption of comparative negligence in place of contributory negligence, was "fairness." *Langmore and Prentice* at 1070.

Considerations of justice and fairness should be weighed against the temptation to simplify matters by discarding contribution. "[E]ven if [the] argument [against contribution] were more persuasive than it is, it could hardly be accepted. For, at bottom it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable,

settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage out-of-court accommodations." *United States*, 421 U.S. at 408.

D. Contribution Benefits Both The Plaintiff And The Legal System

Both Petitioners and *Amicus* argue that contribution places unnecessary burdens on litigants and the courts. A more studied look indicates that contribution benefits both plaintiffs and the legal system, by bringing all wrongdoers to justice, providing incentives to disclosure of relevant evidence, and permitting all claims to be resolved efficiently and consistently.

Although, allowing contribution does lessen plaintiff's control of the case, the plaintiff's only legitimate concern is compensation, not who pays it. *Langmore and Prentice* at 1093. If the plaintiff is accorded too much control, it may encourage collusion and bribery between the plaintiff and defendants and potential defendants. Note, *Judicial Implication of Contribution Under Section 10(b) of the Securities Exchange Act: Is the New branch on the Judicial Oak Threatened by Strict Statutory Construction?* 16 Suffolk U. L. Rev. 983, 988 (1982) [hereinafter *Judicial Oak*]; Note, *Rule 10b-5 Developments – Damages and Contribution*, 39 Wash. & Lee L. Rev. 1016 (1982); *Skinner*, 70 Ill. 2d 1, 374 N.E.2d at 442.

The Securities Acts of 1933 and 1934 were passed in large part to protect investors, who usually become plaintiffs in these suits. *SEC v. Capital Gains Research Bureau*, 375 U.S. 180 (1963); *Straley v. Universal Uranium & Milling Corp.*, 239 F.2d 370, 372 (9th Cir. 1961). It is well established that the enforcement of the securities laws is dependent in large part on suits brought by these private litigants. *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964); *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 456 U.S. at 380.

These plaintiffs generally sue as many defendants and under as many theories as possible. *Langmore and Prentice* at 1094. This is not necessarily a bad thing for the ultimate administration of justice because by the time defendants are done pointing their fingers at each other, they may have gone a long way towards making plaintiff's case. *Id.* at 1095. Defendants who were involved in a common scheme are often in the best position to demonstrate the fault of their confederates. Thus contribution benefits both the plaintiff and the legal system by facilitating discovery. *Judicial Oak* at 988.

Admittedly, contribution may increase the costs of litigation, but this argument should be rejected because of the other benefits received under contribution and the related doctrine of comparative negligence. *Langmore and Prentice* at 1094.

"The common law rule precluding intentional wrongdoers from seeking contribution developed long before the evolution of multiparty litigation involving class plaintiffs, numerous defendants, vast monetary claims, lengthy trials, and enormous litigation costs." *Huddleston*, 640 F.2d at 558. Since the judicial system has evolved in the aforementioned respects to accommodate complex litigation, it is now well-prepared to bring all wrongdoers to justice through contribution.

E. Contribution Does Not Discourage Settlement

Petitioners and *Amicus'* contention that contribution discourages settlement is, at best, unsubstantiated. As in this case, contribution can facilitate settlement by permitting the party who pays the settlement, but has limited culpability, to recover from other, more culpable parties.

Also, problems regarding settlement can be addressed by court determinations that a good faith settlement bars further contribution by the settling parties. *See, e.g., Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1228-29 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 232 (1990).

In any case, it is questionable whether encouragement of settlement through disallowance of contribution produces desirable settlements. Instead, disallowance of contribution may create a stampede to settle for a disproportionately small amount to shift the burden of liability to other defendants.

> The disallowance of contribution in the context of such modern multiparty litigation encourages the presentation of enormous claims against numerous defendants in the hope that at least some of those named will, merely to avoid the heavy cost of litigation, pay a settlement amount rather than defend the action. Thus, the no-contribution rule promotes a rush to settlement whereby certain defendants can purchase freedom from litigation and the ultimate court judgment, simultaneously providing the plaintiffs with funds to finance the continuation of the suit against the non-settling defendants. Moreover, the settling defendants may well extricate themselves from the litigation in exchange for relatively small settlement amounts, leaving the non-settling defendants to bear a much larger liability in the form of the final court judgment.
>
> Persons injured by the willful torts or deceit of others are entitled to full redress but should not be able to play one defendant against another as a gambit. Although the law favors compromise as a means of ending litigation, the type of settlement that is reached on the basis of the denial of contribution neither terminates the litigation nor furthers the goal of efficient court administration.

Huddleston, 640 F.2d at 558.

Thus, given the availability of court contribution bars, contribution will not interfere with good faith settlements. Contribution may interfere with settlements which are unjust, but such settlements, in any event, should not be supported by policy.

F. Recognizing The Right To Contribution Under § 10(b) Will, By Promoting Investor Confidence, Further The Goal Of Efficient Capital Formation

The many disparate rules of Congress and holdings of this Court relating to § 10(b) each involve a careful balancing which optimizes "the public interest" and "investor protection" in accordance with the legislative mandate of § 10(b). Some compromises have involved subordination of "the public interest" to "investor protection" while other compromises have had the opposite effect. The result has been an *overall balance* between the two which has carried out the intent of Congress.[29]

The securities laws were adopted at least as much to support the securities markets by promoting investor

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[29] This balancing process is reflected in case law under § 10(b). The need for investor protection is recognized by § 10(b)'s expansion of liability beyond common law fraud. Since Rule 10b-5 violations can be established with a lesser burden of proof than is necessary to establish common law fraud in many states (*Herman & MacLean*, 459 U.S. at 390), Rule 10b-5 promotes investor protection in an independent way unavailable under State common law. Similarly, this court went substantially beyond common law fraud's requirement of direct reliance on misrepresentations in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), which adopted the "fraud on the market" presumption of reliance for Rule 10b-5 cases where securities are traded on an efficient market.

At the same time, to avoid chilling the capital formation markets, the 10b-5 plaintiff must prove "scienter," a highly culpable mental state (*Ernst & Ernst*, 425 U.S. at 212), and must qualify as a purchaser or seller of the subject securities (*Blue Chip Stamps*, 421 U.S. at 744), and is not entitled to punitive damages. 15 U.S.C. § 78bb(a). These aspects of 10b-5 jurisprudence are more restrictive than common law fraud, which may allow claims for negligent misrepresentation (*see, e.g.*, Cal. Civ. Code § 1709), does not restrict the class of plaintiffs solely to purchasers or sellers (*Ernst & Ernst*, 425 U.S. at 744), and awards punitive damages. *See, e.g.*, Cal.Civ.Code § 3294

confidence as to protect individual investors. "The federal securities laws were enacted for the purposes of restoring investor's confidence in financial markets, *Marine Bank v. Weaver*, 455 U.S. at 555, 102 S. Ct. at 1223, reducing transaction costs associated with a caveat-investor rule, *H.R. Rep. No. 1383, 73d Cong., 2d Sess.* 4-5 (1934), and enhancing the free flow of capital, *Daily v. Morgan*, 701 F.2d 496, 500-02 (5th Cir. 1983)." *Futura Development Corp. v. Centex Corp.*, 761 F.2d 33, 40 (1st Cir. 1985).

The drafters of the securities laws recognized the direct link between investor confidence and the willingness of investors to provide investment capital which can keep our economy growing. Thus, registration was required for public securities offerings, in order "to protect honest enterprise . . . ; to restore the confidence of the prospective investor . . . ; to bring into productive channels of industry and development capital which has grown timid . . . ; and to aid in providing employment and restoring buying and consumer power." *S.Rep. No. 47, 73d Cong., 1st Sess.*, 1 (1933), quoted in *Pinter*, 486 U.S. at 638 n.14.

Allowing joint wrongdoers under Rule 10b-5 to seek contribution from other joint wrongdoers whom the Plaintiff elected not to sue, will ultimately serve and promote the primary objectives of Congress by benefitting the economy as a whole *and* by protecting investors.

If the investing public sees wrongdoers who violated Rule 10b-5 escape all punishment, public confidence in the integrity of our markets and the "level playing field" which all investors are entitled to expect will be impaired.

This chilling of investor confidence will be particularly strong where the wrongdoers who escape all liability are, as in the present case, lawyers and accountants who will continue their active relationship with the securities markets by drafting future prospectuses and disclosure documents for other publicly traded companies, or by certifying financial statements for other publicly traded companies, long after having damaged the Cousins investors.

Each time a wrongdoer escapes liability based upon the "no contribution" rule for § 10(b), investor confidence will be chilled, investment activity will be slowed, investors will abandon the capital markets, and the ability of businesses to turn to those markets for capital will be impaired. Allowing contribution actions among 10b-5 violators assures investor confidence and vigorous investment, the very goals which Congress sought to implement in § 10(b).[30]

Thus, in the § 10(b) context, allowing contribution among joint tortfeasors would (1) promote public confidence in the capital formation markets, leading to heightened investment; and (2) promote deterrence of other potential wrongdoers by assuring that no violator of Rule 10b-5 escapes punishment. A rule denying contribution would (1) chill the capital formation markets and drive risk averse investors from the capital markets; and (2) minimize the deterrent effect of the securities laws. *Cf.* Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 So. Cal. L. Rev. 726, 730-34 (1968); *see also In Re Oil Spill by the Amoco Cadiz*, 699 F.2d 909, 915 (7th Cir. 1983).

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[30] Petitioners' very theoretical arguments regarding the lack of need for additional deterrence of securities fraud should be considered in light of the urgent real need for deterrence. The 1980's witnessed the emergence of entirely novel methods of securities fraud, including tax shelters, greenmail and "junk" (i.e. non-investment grade) bonds. *See, e.g., Randall v. Loftsgaarden*, 478 U.S. 647 (1986) (tax shelter); *In Re Phillips Petroleum Securities Litigation*, 738 F. Supp. 825 (D.Del. 1990) (greenmail); *United States v. Milken*, 759 F. Supp. 109 (S.D.N.Y. 1990) (junk bonds). These novel devices diverted funds from productive investment, significantly contributed to our low national savings and investment rate, and weakened this country's competitiveness in the world economy.

G. Fraud Imposes Economic Costs On The Securities Markets Greater Than The Losses Suffered By Individual Investors, Thereby Justifying Contribution

In examining contribution, one might ask what difference it makes to the wronged investor if there is contribution, as long as that investor can obtain compensation for his injury.

Fraud, however, imposes costs on the securities markets in addition to the losses to the defrauded investor. As noted by Professor Posner:

> [T]here is a social cost from securities fraud, albeit not a cost equal to the losses of the shareholders who were hurt by the managers' concealment. Three kinds of social cost in fact are possible, though all are difficult to quantify. First, the managers may have expended real resources on concealing the bad news. Second, and related, if fraud is prevalent, investors will have an incentive to expend more resources on trying to find out the truth about firms, because they have to overcome the disinformational efforts of corporate managers. (This is a major reason, by the way, why theft is not a simple transfer payment, but inflicts net social costs.) Third, the prevalence of fraud may make the stock market more volatile, imposing disutility on the risk-averse investor.

Posner, *Law and Theory of Finance: Some Intersections*, 54 Geo. Wash. L. Rev. 159, 170 (1986).

Professor Posner finds that such costs justify the fraud on the market cause of action, thus further indicating that it is efficient to deter such costs through legal actions in general, including contribution.

Not only does deterrence of such costs provide economic justification for a contribution action; deterrence of such costs also fulfill's Congress's legislative determination to protect the overall welfare of the securities markets, as discussed above.

Accordingly, in light of the applicable public policies, this Court should reaffirm the right of a Rule 10b-5 defendant to seek contribution from joint wrongdoers, a method of recovery embraced by the overwhelming majority of the federal courts.

VII.

THIS COURT SHOULD NOT OVERRULE *FRANKLIN V. KAYPRO*

Certiorari was granted to review only one issue – whether an implied right of contribution exists under § 10(b). In granting *certiorari*, this Court has never agreed to review the holding of *Franklin*. The urging of Petitioners' *Amicus* that *Franklin* be overruled should therefore remain unaddressed.[31]

Should this Court decide to reach the issue, *Franklin* should be affirmed and made the law in all circuits.

Franklin held that determination of the fairness of a "partial settlement" insulates settling defendants from liability for contribution to non-settling co-defendants. The non-settling defendants, if found liable at trial, are not held liable for that proportion of the total liability which the trier of fact attributes to the settling defendants.

The *Franklin* approach is fair, in that each of the non-settling defendants is liable only for his fair share of damages.

The *Franklin* approach is economically efficient by eliminating enormous transactional costs for the "mini trials" traditionally associated with partial settlements.

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[31] Since this Court has not granted *certiorari* to review the *Franklin* method of apportioning liabililty between settling and non-settling defendants, this issue is *not* fully briefed herein. Given the multiplicity of other issues herein, this case does not present an opportunity for such briefing. Should the Court be interested in considering this issue, Respondents hereby request leave to file a supplemental brief on the subject.

In *Donovan*, 752 F.2d at 1178, Judge Posner suggested a "comparative fault" apportionment rule which is identical to the apportionment and settlement bar mechanisms of *Franklin*. Judge Posner recognized that the rule would confer enormous benefits, because it would avoid complex "fair share" mini-trials for partial settlements, would provide defendants with an incentive to settle, and would leave non-settling defendants liable only for their fair share of the total liability as determined at trial.

Judge Posner explained that the "comparative fault" method would minimize transaction costs involving settlement:

> The comparative-fault [proportionate] rule provides a neat solution to these problems [of high transaction costs to settle]. It encourages settlement by immunizing the settling defendant from liability for contribution but does not require a hearing on the fairness of the settlement to other tortfeasors.

Id. at 1181.

Thus, efficiency and justice both support the *Franklin* method for apportioning loss between settling and non-settling defendants.

VIII.

THIS COURT SHOULD DEFER TO THE SEC'S INTERPRETATION OF THE SCOPE OF RULE 10b-5, AS PRESENTED IN ITS *AMICUS* BRIEF

In *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), this Court has recognized the propriety of deference to an administrative agency's construction of the statutory scheme it oversees.

> If Congress has explicitly left a gap for the agency to fill . . . *a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.*

Id. at 843-4 (emphasis added).

One leading authority has noted that such deference should be paid even to positions taken by administrative agencies' briefs before the courts.

> If the matter at issue is one for which the agency has responsibility, if all requisite procedures have been complied with, and if there is no doubt that the position urged has full and considered approval of the agency head, it is far from self-evident that the agency's views should be denied their accustomed force simply because they are first presented in the prosecution of a lawsuit.

Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 519 (1989).

It is undisputed that Rule 10b-5, a longstanding rule issued by the Securities and Exchange Commission ("SEC") itself, is within that agency's aegis. There is also no doubt that the SEC's *amicus* brief is a deliberate effort produced by the SEC's ongoing *amicus* program.

> The operation of the Commission's amicus program today is much different from the Commission's program in its early years. Not only does it participate in more cases, it is more systematic in choosing the cases in which it will participate.

Ruder, *The Development of Legal Doctrine Through Amicus Participation: the SEC Experience*, 1989 Wisconsin L. Rev. 1167, 1170 (1989).

Thus, the SEC's *amicus* brief filed in support of Respondents herein meets the criteria set forth in the above-quoted article for deference, and therefore should be accorded such deference.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

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MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR,

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I.

THE COURT SHOULD DECLINE INVITATIONS TO ABANDON ITS INTENT-BASED JURISPRUDENCE OF IMPLIED STATUTORY RIGHTS

Respondents and their amici paint a dismal picture of § 10(b) indeed. Unanimously, they portray it as a ship cut loose from its moorings which this Court can neither tie up nor anchor where it floats. A statute which authorized an administrative agency to make rules to regulate markets has become, they say, a charter for federal judges to invent civil claims for the sake of judicially perceived public policy.

Worse, the arguments for contribution in this case would cut the hawsers of every statute in which a federal court has implied a private right of action.

The slippery, policy-based jurisprudence of implied rights advocated by Respondents and amici contradicts the Court's principles of implied rights. The Court should not abandon its principles in this case.

A. The Court Should Reject Expansion Of Federal Common Law In The Guise Of "Fleshing Out" The Victim's Claim.

Respondents and those amici who discuss the source of federal law-making power all urge the Court to adopt contribution as a "fleshing out" or "rounding out" of the victim's § 10(b) implied cause of action.[1] Respondents and amici use "fleshing out" to avoid confronting an argument they cannot win. Not a single brief can refute Petitioners' demonstration that under the analysis of *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), federal courts have not been granted the power to craft federal securities common

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[1] Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) (1988) will be referred to simply as § 10(b). The Securities Act of 1933 will be referred to as the "1933 Act." The Securities Exchange Act of 1934 will be referred to as the "1934 Act."

law. Brief for Petitioners 32-37; *see Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979) (no authority to create private rights arises from the 1934 Act's general grant of jurisdiction to federal courts).

"Fleshing out" substitutes in the briefs for analysis of whether Congress granted federal courts the power to create federal securities common law. One brief admits as much. (Brief of the First Boston Corporation, et al., as Amici Curiae in Support of Respondents ("FB") 12-13.) Certainly the Ninth Circuit thinks it has such federal common law powers, as it builds its ever more complex jurisprudence of contribution and its consequences. *Employers Insurance of Wausau v. Musick, Peeler & Garrett*, 954 F.2d 575, 579 (9th Cir. 1992).

Surprisingly, Respondents and the Securities and Exchange Commission ("Commission") all rely for their fleshing or rounding theories on the very case which precludes them. *Virginia Bankshares, Inc. v. Sandberg*, No. 89-1448, slip. op., 115 L.Ed.2d 929 (U.S. June 27, 1991). There, the Court commented that once "private statutory rights [have] developed without clear indications of congressional intent" the Court may recognize claims of persons not embraced within the original implication when the failure to do so "would be demonstrably inequitable to a class of would-be plaintiffs with *claims comparable to those previously recognized*." *Id.* at 953 (emphasis added). The inquiry, however, is limited to "deciding where the outer limits of the right should lie", not creating new rights. *Id.*

There is nothing "comparable" between a victim's right to recover losses under § 10(b) and a perpetrator's claim to share the burden of compensating the victim. Neither does this case probe the outer limits of victims' § 10(b) rights; it concerns victims only through its adverse collateral consequences.

- Indisputably, contribution is a new cause of action, vested in a perpetrator of securities fraud rather than in a victim. The Commission admits that contribution is an independent right of action under *Texas Industries*. (Brief for the Securities and Exchange Commission as Amicus Curiae in Support of Respondents ("SEC"), 11.)
- Indisputably, contribution is unnecessary to providing justice to victims of fraud, nor is it a defense against the charge of fraud. The party seeking contribution has lost nothing at all until it compensates a victim for its own wrongdoing.
- Indisputably, contribution adds parties to cases and generates additional cases.

Arguing for "fleshing out", the Commission contradicts positions the United States urged upon the Court last term. The United States argued that "the power to create remedies for violations of federal statutes rests exclusively with Congress." Brief of the United States as Amicus Curiae Supporting Respondents, *Franklin v. Gwinnett County School District*, No. 90-918, at 4. The United States urged that Congress should be deemed to exercise the power to create a remedy only by passing a law that affirmatively authorizes the remedy. *Id.* at 4-5. Now, the Commission supports Respondents' request to create a whole cause of action because, "Defendants . . . are entitled to have § 10(b) applied fairly to them." (SEC 11.) By the United States' own principles, this puts the answer before the proper question.

The Commission also argues that inventing a contribution cause of action "is not a large step." *Id.* To the contrary, it is a giant leap. The "fleshing out" theory applies indistinguishably to every implied right of action ever recognized by a federal court. As it "fleshed out" § 10(b), the Court would hang the same meat on at least the following important private causes of action: the Commodity Exchange Act (7 U.S.C. §§ 1-26);[2] § 14 of the 1934 Act (15 U.S.C. § 78n);[3]

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[2] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 356 (1982).

[3] *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964); *H.K. Porter Co. v. Nicholson File Co.*, 482 F.2d 421 (1st Cir. 1973).

§ 901 of Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681-1758);[4] § 504 of Rehabilitation Act of 1973 (29 U.S.C. § 794);[5] § 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c);[6] implied causes of action under civil rights law (42 U.S.C. §§ 1981 and 1982).[7]

B. No Principled Distinction Exists Between Implied and Express Victims' Remedies For The Purpose of Analyzing Whether To Imply Contribution.

Respondents and the Commission compose a false distinction between implied causes of action and express causes of action. The same analysis which foreclosed contribution in antitrust cases (*Texas Industries*, 451 U.S. 630) should foreclose contribution in § 10(b) cases. In *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310-311 (1985), this Court rejected distinctions in analysis between express and

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[4] *Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979); *Franklin v. Gwinnett County Public Schools*, No. 90-918, slip op., 117 L.Ed.2d 208 (U.S. Feb. 26, 1992).

[5] *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284-86 (7th Cir. 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413, 415 (8th Cir. 1977). *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984).

[6] *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

[7] Implied private cause of action: *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). Conflict regarding implied contribution: *Wright v. Reynolds*, 703 F.Supp. 583, 591 (N.D. Tex. 1988). *Gray v. City of Kansas City, Kan.*, 603 F.Supp 872, 874 (D. Kan. 1985) (no right to contribution under 42 U.S.C. §§ 1981 or 1983); *Anderson v. Loc. U. No. 3, Intern. Broth. of Elec.*, 582 F.Supp. 627 (S.D.N.Y. 1984), *aff'd*, 751 F.2d 546 (2d Cir. 1984)(no implied right to contribution or indemnity among joint Title VII and § 1981 defendants); *Miller v. Apartments & Homes of N.J., Inc.*, 646 F.2d 101 (3d Cir. 1981) (implying right of contribution).

implied causes of action and specifically welded antitrust analysis and § 10(b) analysis. The Court rejected the argument that it should use different policy analysis to determine the application of the pari delicto defense to § 10(b) cases than it had used to consider the same defense in antitrust cases. *Id.* at 309-310. Properly understood, *Bateman Eichler* teaches that federal courts should invent no more federal common law surrounding an implied cause of action than would be necessary if the cause of action had been created expressly by Congress.

Nothing in any of the briefs supplies justification for the Court to depart from its intent-based jurisprudence of implied contribution claims.

II.

RESPONDENTS AND AMICI FAIL TO SHOW AFFIRMATIVE INTENT OF CONGRESS TO CREATE A RIGHT OF CONTRIBUTION

A. Respondents And Amici Use The Wrong Analysis To Determine Congressional Intent.

In one way or another, Respondents and the Commission all argue that the Court should apply the "most analogous statute" analysis of *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, No. 90-333, slip op., 115 L.Ed.2d 321 (U.S. June 20, 1991), *reh'g denied*, 115 L.Ed.2d 1109. The "most analogous statute" test is an analytical model of last resort, used when the Court is forced to choose between two forms of a mandatory procedure. As a matter of history and precedent, virtually every enforcement process needs a statute of limitations. No claim needs a right of contribution. The Court rightly looks for clear and affirmative congressional intent to create a right of contribution. *Texas Industries, Inc.*, 451 U.S. at 638. No brief explains why the Court should abandon the affirmative intent test and either impute to Congress an intent which did not exist or use last resort reasoning when last resort conditions do not exist.

B. Congress Did Not Have A Clear And Affirmative Intent.

Respondents and amici fail to explain material gaps in Congress' creation of contribution rights in the express civil remedy sections of the 1933 and 1934 Acts. First, respondents and amici improperly relegate § 12 of the 1933 Act to footnotes or oblivion, lacking a substantive basis to explain why Congress did not grant contribution claims to § 12 defendants. Separating the 1933 and 1934 acts is not historically or intellectually proper, as the Commission especially should know. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 (1976), *reh'g denied*, 425 U.S. 986 (1976). Section 12 imposes liability on persons who sell unregistered securities or sell securities by means of a materially false communication. It cannot be distinguished on the ground that it applies to transactions involving face-to-face buyers and sellers while § 10(b) applies to markets; this Court found, through the plain meaning of the definition of "security", that § 10(b) was intended to apply to both personal transactions (including sales of whole businesses) and impersonal markets. *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985).

Neither can § 16(b) of the 1934 Act be casually turned away. A control person can be liable for short swing profits received by a controlled person, irrespective of whether the control person received any of the profits. Neither § 16(b) (15 U.S.C. § 78p(b)) nor § 20(a) (15 U.S.C. § 78t(a)) provides for the control person to have contribution against the person who actually received the profit.

Respondents and the Commission also incorrectly dismiss the omission of contribution from the control person liability sections of the 1933 and 1934 Acts. *See* 1933 Act § 15 (15 U.S.C. § 77o) and 1934 Act § 20 (15 U.S.C. § 78t). Their argument is textually debatable because the control person sections impose liability "to the same extent as the controlled person" without expressing any grant of correlative rights; contribution is not a limitation on liability but a prospect of sharing it. Their argument also fails to take into

account § 20's substantive terms, which Congress might have expected to have civil money damages consequences. Section 20 prohibits both doing through others that which one is prohibited from doing directly and hindering an issuer from making its required reports. Respondents' distinction of control person sections is historically weak because the legislative history fails to indicate Congress considered whether control persons would have contribution claims. H.R. Rep. No. 1383, 73d Cong. 2d. Sess. (1934) 26 (control person liability was then contained in § 19 of the bill); H.R. Rep. No. 1838, 73d Cong. 1st. Sess. (1934) 19, 37 (control person liability was contained in § 20 of the bill but was discussed as § 19); S. Rep. No. 792, 73d Cong. 2d Sess. (1934) 22. Finally, the argument is fanciful because it assumes Congress anticipated an interpretation made 45 years after enactment by only one of several courts to consider whether control persons have contribution claims. *Compare Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672, 675 (9th Cir. 1980), *cert. denied*, 452 U.S. 963 (1981) with *In re Olympia Brewing Co. Sec. Litig.*, 674 F.Supp. 597, 615 n.18 (N.D. Ill. 1987); Loewenstein, *Implied Contribution Under the Federal Securities Laws: A Reassessment*, 1982 Duke L.J. 543, 551 (1982).

The Commission incorrectly argues that the Insider Trading and Securities Fraud Enforcement Act of 1988 ("§ 20A")[8] is not relevant. The Commission contends Congress must have omitted contribution from § 20A because a defendant is "essentially liable" only for its own gain. (SEC. 19.) This is a strangely constricted reading of § 20A; although the total liability of all defendants is limited to the profit gained or loss avoided, both controlling persons and tippers may be jointly and severally liable notwithstanding they gained nothing and avoided no loss. §§ 20A(b)(3) and 20A(c).

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[8] Pub. L. No. 100-704, § 5, 102 Stat. 4680, adding section 20A to the 1934 Act (15 U.S.C. § 78t-1).

C. Congress Has Not Ratified Contribution Under § 10(b).

Respondents (but not the Commission) suggest that lower courts' creation of contribution claims has been ratified by Congress. If a large number of lower court decisions regarding § 10(b) equated to congressional ratification, *Lampf* was wrongly decided.[9] Although a ratification argument might have some force if Congress had legislated regarding contribution over the years, the fact remains that neither Respondents nor amici can identify a single occasion when Congress mentioned the subject, even in a committee report.

The history of contribution differs markedly from the histories of rules discussed in the authorities cited by Respondents. In *Merrill Lynch*, the Court had recognized victims' private actions under the Commodities Exchange Act ("CEA") before Congress undertook "a comprehensive reexamination and significant amendment of the CEA." *Merrill Lynch, Pierce, Fenner & Smith*, 456 U.S. at 380. The Court considered congressional oversight as a factor because extensive analysis of the legislative history showed Congress specifically considered the victims' implied claims and just as specifically preserved those claims. *Id.* at 382-388. In *Herman*, the Court commented that Congress in 1975 had conducted " 'the most searching reexamination of the competitive, statutory, and economic issues facing the securities markets, the securities industry, and, of course, public investors, since the 1930's.' " *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385, n.20 (1983) (quoting House Conference Report). At that time, the victim's § 10(b) claim had

[9] "During the ensuing four decades of administering § 10(b) litigation, the federal courts also applied settled law when they looked to state law to find the rules governing the timeliness of claims. [Citations omitted.] It was not until 1988, that a federal court decided that it would be better policy to have a uniform federal statute of limitations to apply to claims of this kind." *Lampf*, 115 L.Ed.2d at 338 (Stevens, J. and Souter, J., dissenting).

been recognized for nearly 30 years, often in cases where plaintiffs sought relief under several statutes. The Court said the history "suggests" Congress ratified the decisions permitting victims to pursue § 10(b) claims and other remedies together. In holding that fraud victims were not limited to express remedies where available, the Court placed little emphasis on the suggestion of ratification. In short, *Merrill Lynch* and *Herman* identify the outer limits of ratification as a factor in determining Congress' intent.

Respondents' ratification argument far exceeds the outer limits. At the 1975 reexamination of the securities laws, the first case recognizing contribution was only seven years old. *deHaas v. Empire Petroleum Co.*, 286 F.Supp. 809 (D. Colo. 1968), *aff'd in part, rev'd in part*, 435 F.2d 1223 (10th Cir. 1970). Contribution had penetrated the level of the Courts of Appeals only in a per curiam affirmance. *Globus, Inc. v. Law Research Service, Inc.*, 442 F.2d 1346 (2d Cir. 1971), *cert. denied*, 404 U.S. 941 (1971). Cases implying contribution were not unanimous; the first published decision denied contribution. *Shea v. Ungar* [1964-1966 Transfer Binder] Fed. Sec. L. Rep. CCH ¶ 91,558 (S.D.N.Y. 1965). Respondents cannot point to anything in Congressional review of securities law which suggests Congress has noticed the implication by some courts of contribution in § 10(b). Ratification analysis fails to aid Respondents.

Respondents Employers Insurance of Wausau and Federal Insurance ("Employers") uniquely attempt to argue ratification from the legislative history of § 20A (Brief for Respondents ("EMP") 11-17), but that history demonstrates Congress' exclusive concern for claims of victims of fraud and insider trading. The report of the House Energy and Commerce Committee specifically recognized the statute would impose liability on tippers and controlling persons, a matter which was the subject of amendment at the committee level, but did not discuss the possibility of granting contribution rights. H.R. Rep. No. 100-910, 100th Cong. 2d Sess. 27, 39 (1988), 7 U.S. Code Cong. & Admin. News. 6043, 6064,

6076 (1988). The Committee expressed concerns of excessive liability, much like those expressed by Respondents and amici, but resolved those concerns by limiting damages without mentioning contribution. *Id.* The Committee's discussion of the non-interference language of § 20A(d) dispels any notion that the Committee considered any implied rights of action other than claims of victims of fraud:

> At the full Committee markup, the Committee also accepted an amendment to delete the paragraph containing an express private right of action for parties other than contemporaneous traders. The Committee's intention in this amendment was to avoid creating an express private cause of action which might have the unintended effect of freezing the law or in any way restricting the potential rights of action which have been implied by the courts in this area. Rather, the Committee wanted to given (sic) the courts leeway to develop such private rights of action in an expansive fashion in the future.

Id. at 27, 6064. In short, the Committee focused exclusively on victims' claims, indeed, even more exclusively on claims by victims of misappropriation of inside information.[10] Employers' truncated quotations of the above paragraph of the Committee report and another paragraph on the same topic paint an inaccurate picture of Congress' words and intent.[11] Nowhere in the portion of the report relating to

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[10] This Court reached the same conclusion based on the language of § 20A: "The language of § 20A makes clear that the 100th Congress sought to alter the remedies available in insider trading cases and *only* in insider trading cases. *Lampf*, 115 L.Ed.2d at 335

[11] After discussing a case in which misappropriation of inside information allegedly caused a purchaser to pay an excessive price in a tender offer takeover, the Committee wrote:

> The section on private rights of action explicitly states that nothing in this section may be construed in any fashion to limit or condition the right of any person to bring an action to enforce a requirement of the Exchange Act, or the availability of any cause of action implied under the Exchange Act. The Committee in fact expressly recognizes the implied right of action under the securities laws for cases including but not limited to the situations such as that noted above in the Anheuser-Busch case.

Id. at 28; 6065.

private rights of action is there any suggestion that the Committee thought about contribution. *Id.* at 26-28; 6063-6065.

D. Various Other Arguments Of Respondents Actually Support Petitoners.

Employers incorrectly contend the history of the pari delicto defense supports implied rights of contribution. The legislative history lacks reference to the pari delicto defense, but if the Court correctly understood general congressional intent regarding enforcement, contribution in its most general application violates the principles of pari delicto. If contribution is administered pro rata "as in contract"[12] (Restatement of Restitution § 85 (1937)) or in a manner that a person 30% responsible may recover against one 10% responsible, it contradicts the principle barring a claim by a plaintiff who "bears at least substantially equal responsibility for the violations he seeks to redress . . . ." *Bateman Eichler, Hill Richards, Inc.*, 472 U.S. at 310-311.[13]

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[12] 1933 Act § 11(f) (15 U.S.C. § 77k(f)); 1934 Act § 9 (15 U.S.C. § 78i); 1934 Act § 18 (15 U.S.C. § 78r).

[13] Employers contend *Bateman Eichler* supports contribution by misinterpreting that decision to say co-violators should be allowed to sue each other in order to expose each other. What *Bateman Eichler* observed was that applied to a tippee, the pari delicto defense would remove any incentive to sue a fraudulent tipper, thus undermining the goal of exposing the tipper. *Bateman Eichler, Hill Richards, Inc.*, 472 U.S. at 315-316. Denying contribution has no such effect because it does not limit the real victim's incentive to sue any perpetrator and, once suit is commenced, to conduct discovery to identify all perpetrators.

Volunteer Respondents Peat Marwick Main & Co. et al. ("Peat") and several amici improperly attempt to impute to Congress the policy judgments they now advocate. Those amici also base their policy arguments on the supposedly beneficent effect of sharing liability according to relative fault. The arguments comprise an oxymoron because contribution "as in contract" and in tort was administered pro rata without regard to relative fault in 1933 and 1934. Restatement of Restitution § 85 (1937) (proportionate sharing in contract); Restatement of Restitution § 86 (1937) (rule of § 85 applies when contribution is available in tort); *see* Restatement of Restitution § 88 (1937) (contribution is not available to a tortfeasor who is guilty of negligent or worse conduct).[14] Although flaw fills the policy arguments, the point here is that there is no evidence Congress adopted any policy argument whatsoever. None of the parties can contradict Petitioners' statement that the record is absolutely silent regarding Congress' reasons for including contribution in some private securities remedy statutes.[15]

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[14] Certainly contemporaneous commentators understood Congress to mean that contribution would be administered pro rata. Douglas and Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 178-81 (1933); 3 Loss, Securities Regulation 1771-72 (2d ed. 1961).

[15] Employers argue that the Court should defer to the Commission's "construction" of § 10(b), calling Rule 10b-5 and Commission's amicus brief such a construction. The Commission makes no such argument. The Court foreclosed the same argument in *Ernst & Ernst*, 425 U.S. 212-214. There the Commission argued that its interpretation of § 10(b), through Rule 10b-5, as encompassing negligence deserved this Court's deference. The Court deferred neither to the Commission's amicus arguments nor to its view of Rule 10b-5. Holding that scienter is an element of a violation of § 10(b), the Court emphasized that the Commission lacks power to make law.

III.

POLICY SUPPORTS A RULE OF NO CONTRIBUTION

Respondents and amici devoted substantial energy and 80 pages to policy arguments. Two briefs are devoted entirely to policy and an issue outside the scope of the Petition. (Brief of American Institute of Certified Public Accountants as *Amicus Curiae* in Support of Respondents ("AICPA"); Brief of *Amicus Curiae* Securities Industry Association in Support of Respondents ("SIA"). *See* EMP, 6-11, 37-46; Brief for Respondents Peat Marwick Main & Co., et al. ("PEAT"), 21-30; FB, 12-27 and SEC 22-26.)

In all the policy briefing, only one statement is wholly supportable. Regarding this Court's evaluation of policies for or against contribution, the Commission wrote:

> Without the benefit of congressional guidance, this Court has declined to strike that balance on its own in interpreting the scope of express rights in federal statutory schemes. (SEC, 21.)

If there is to be policy analysis, it must begin with the context of § 10(b) actions, a context ignored by Respondents and amici. Respondents and amici argue contribution policy as if § 10(b) resembled the common law of negligence. This Court has endorsed only intentional dishonesty as a state of mind triggering § 10(b) liability. *Ernst & Ernst*, 425 U.S. at 214. The Courts of Appeal also recognize recklessness as scienter. No party supporting contribution pointed out the rigor of the definition of recklessness adopted by the Courts of Appeal. A defendant with a white heart and empty head escapes liability. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1570 (9th Cir. 1990) (en banc), *cert. denied*, 113 L.Ed.2d 719 (1991) (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977)).

> Reckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which

> presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.

Hollinger, 914 F.2d at 1569 (quoting *Sundstrand Corp.*, 553 F.2d at 1045). *Accord Cook v. Avien, Inc.*, 573 F.2d 685, 692 (1st Cir. 1978); *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 46-47 (2d Cir. 1978), *cert. denied*, 439 U.S. 1039 (1978); *McLean v. Alexander*, 599 F.2d 1190, 1197-98 (3d Cir. 1979); *Broad v. Rockwell Intern. Corp.*, 642 F.2d 929, 961-62 (5th Cir. 1981), *cert. denied*, 454 U.S. 965 (1981); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1025 (6th Cir. 1979); *Hackbart v. Holmes*, 675 F.2d 1114, 1118 (10th Cir. 1982); *S.E.C. v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982).

Taking a § 10(b) violation in context, as a scienter-based offense, the policy arguments made for contribution do not stand up.

Respondents and amici spend too little time examining how to effectuate Congress' regulatory intent, the most important policy value. *See, Bateman Eichler, Hill Richards, Inc.*, 472 U.S. at 315. The briefs recapitulate an argument this Court has not found persuasive, that the supposed certainty of some loss is a better deterrent than the risk of major loss. (AICPA, 13-15; SIA, 14-18; EMP, 37; PEAT, 24.) The argument is particularly unpersuasive where the underlying offense requires at least intentional disregard of the truth and thus always implicates the wrongdoer's ability to weigh consciously the risks and rewards of action.

The Commission's position is particularly curious. Although its primary interest in this case should be deterring securities fraud, the Commission devotes two short paragraphs to admitting it has no real information whether contribution affects deterrence and cannot mount an argument based on economic theory. (SEC, 23.) The Commission's position contradicts the position of the United States in *Texas Industries*, where the United States argued:

> To the extent that the traditional rule against contribution has any effect on potential violators, the United States believes that it is more likely that the risk of bearing a disproportionately large share of the damages liability encourages adherence to the law, particularly to the extent that corporate managers are "risk averse". . . .

Brief for the United States as *Amicus Curiae* in Support of Respondents, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, No. 79-1144 at 12-13. The heading of the United States' argument said it all: "Contribution Is Not Necessary To Effectuate Any Purpose Of The Antitrust Laws, And Such A Remedy Would Undermine Efficient Antitrust Enforcement." *Id.* at 10. The United States also recognized that the added cost of adjudicating contribution could discourage injured parties from bringing enforcement actions. *Id.* at 15-16.

The very alignment of amici in this case demonstrates that a rule of no contribution best serves the deterrent purposes of § 10(b). Amici, other than the Commission, are a trade association for the accounting profession, a trade association for members of the securities industry and certain major investment bankers. The investing public must count upon accountants and securities professionals to assure the integrity of the market.[16] The private amici obviously believe

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[16] *Accountants: United States v. Arthur Young & Co.*, 465 U.S. 805, 819 (1984) ("Thus, the independent auditor's obligation to serve the public interest assures that the integrity of the securities markets will be preserved. . . . "); AICPA Professional Standards § 53.01 through § 53.04 (1988) (e.g., "A distinguishing mark of a profession is acceptance of its responsibility to the public. The accounting profession's public consists of clients, credit grantors, governments, employers, investors, the business and financial community and others who rely on the objectivity and integrity of certified public accountants to maintain the orderly functioning of commerce.")

Securities Professionals: Bateman Eichler, Hill Richards, Inc., 472 U.S. at 315 (denying the *pari delicto* defense to insiders and professionals who tip inside information "will best promote the primary objective of the

contribution reduces their exposure in fraud litigation; contribution thus minimizes their incentive to perform their functions. Amici illustrate the validity of the Easterbrook, Landes & Posner risk adversity analysis.[17] Indeed, the battle of amici on the issue of proportional fault, not raised by the Petition, illustrates their real agenda. The deeper purpose for supporting contribution is to use contribution-driven settlement procedures to repeal *de facto* the accepted rule of joint and several liability to fraud victims and replace it with several liability proportionate to relative fault.

Respondents and amici contend "fairness" supports contribution. (EMP, 38-40; PEAT, 22-23; AICPA 6-12; FB 18-20; SEC 22-23.) The Commission's position is surprising because it contradicts the position of the United States in *Texas Industries*. There, the United States urged the Court, "Implying a common law right of contribution in antitrust cases based on judicial perceptions of 'fairness' is particularly hazardous in antitrust cases since fairness arguments often cut both ways." Brief for the United States as *Amicus Curiae* in Support of Respondents, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, No. 79-1144 at 21. The United States pointed out that considerations of fairness do not support "contribution in cases of intentional or *reckless* wrongdoing." *Id.* (emphasis added). Petitioners here agree with the United States in *Texas Industries* that there is no reason to relieve any intentional or reckless wrongdoer of the full consequences of his or her misdeeds. *Id.* at 22. It is not possible, as one amicus put it, to be "tangentially related" to a scienter-dependent wrong. As in antitrust, the participation of all defendants is usually required for the successful perpetration of securities fraud. *Id.*

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federal securities laws – protection of the investing public and the national economy through the promotion of 'a high standard of business ethics . . . in every facet of the securities industry.' ")

[17] Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: a Legal and Economic Analysis*, 23 J. Law & Econ. 331, 332, 353 (1980).

at 22. And, of course, the states have not "overwhelmingly" adopted contribution for scienter-based torts. See Restatement (Second) of Torts § 886A and comments j and k (1979).

The "fairness" assertions are bound up with expressions of fear of coerced or collusive settlements. The briefs quote as support narrative from *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), *reh'g denied*, 423 U.S. 864 (1975). They disregard the fact that the Court's comments in *Blue Chip* pre-dated *Ernst & Ernst*'s scienter requirement by a year. None of the briefs offers any empirical evidence that accountants or securities professionals are coerced to settle cases dependent upon scienter. The United States correctly pointed out the absence of any evidence of a problem of coercion in the antitrust field, where (a) simple damage exposure is at least as great as in securities cases, (b) simple damages are trebled and (c) contribution has never been allowed. Brief for the United States as Amicus Curiae in Support of Respondents, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, No. 79-1144 at 22-23 and authorities there cited.

Respondents and amici cite a law review article which questions whether the merits matter in the settlement of certain securities cases. Whatever may be said of the case selection and limited case review performed by the author, the article says nothing about § 10(b) cases. The article surveyed cases involving initial public offerings, so under § 11 of the 1933 Act, the issuer was strictly liable for damages caused by material misrepresentations or omissions, and other defendants were required to prove their own due diligence. *See*, Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 507 (1991); 1933 Act § 11 (15 U.S.C. § 77k).

Respondents and amici also appear to forget that their vexations all arise from class actions. The district courts have the power and duty under Rule 23(e) of the Federal Rules of Civil Procedure to supervise settlements and approve only

settlements which are fair. Parties who believe a partial settlement or an early "stampede" settlement is unfair have a remedy in objecting to it.

Respondents and amici contend that contribution should be implied because § 10(b) litigation imposes excessive burdens on accountants, lawyers and securities professionals, and those burdens should be shared. Petitioners are lawyers and accountants who disagree. Excessive burdens should be removed by appropriate tests of liability, not by distributing their inappropriate consequences on others.

One cannot help but question whether any compelling fairness results from adjusting perpetrators' shares of compensation for victims of intentional and reckless wrongdoing. Unlike most claims in tort and contract, contribution is not founded on the breach of a duty the defendant owed to the plaintiff. Rather, it is founded on the breach of a duty each owed to a third person.[18] Disallowing contribution – altogether or to primary wrongdoers – frustrates no legitimate expectation of compensation for a wrong.

IV.

IF CONTRIBUTION WERE PERMITTED, IT SHOULD BE DENIED TO PARTIES LIKE RESPONDENTS WHO CLAIM TO BE SUBROGATED TO PRIMARY WRONGDOERS

In the world of securities litigation, this is a man-bites-dog case. Peat and amici desire contribution for the benefit of secondary target professionals against issuers of securities and their officers, the primary wrongdoers in fraud cases. Here, insurance carriers claim to be subrogated to the primary wrongdoers and sue the secondary target professionals. If the

[18] *See* 18 C.J.S. Contribution § 2 (1990) ("Also, contribution requires a duty from the third party defendant to the original plaintiff while indemnity posits a duty from the third party defendant to the third party plaintiff, or the original defendant.")

Court considers "fleshing out" and policy arguments, the equivalent of creating common law, it should preclude Employers from pursuing its complaint on common law grounds.

Insurers normally do not become subrogated to their insureds' potential claims against their insureds' professional advisors. *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 107 (2d Cir. 1991); *Goodley v. Wank & Wank, Inc.*, 133 Cal.Rptr. 83, 87-88 (Cal.App. 1976) (claim against attorney not assignable); *Fifield Manor v. Finston*, 354 P.2d 1073, 1078, 7 Cal.Rptr. 377, 387 (Cal. 1960) (non-assignable causes of action are not subject to subrogation) *Kracht v. Perrin, Gartland & Doyle*, 268 Cal.Rptr. 637, 640 (Cal.App.1990) (characterization of claim as something other than malpractice will not evade the rule). Common law policies should bar Employers' claims. Litigation with one's attorneys creates adversity which terminates the attorney-client relationship. Litigation with one's auditors impairs independence and requires their replacement. Insurers should not be permitted to preempt expensive and sensitive client decisions to terminate personal relationships between attorney and client or auditor and client, especially with respect to professionals involved in securities disclosures.

The complaint does not allege that the attorneys and accountants were more at fault than the company and its officers. Instead it admits the fault of the principals. Jt. App. 16, ¶ 26. The material misrepresentations and omissions which must have been the basis of the settlement of the *Cousins* litigation were made by the company and its officers, not Petitioners. The complaint describes alleged misrepresentations and omissions arising out of Cousins' core business operations, including risks relating to expansion plans, failure of sales to meet expectations, excessive and unplanned costs and expenses, lack of internal accounting and management controls, logistic and supply problems, high costs of delivery in some markets, overspending, inability to control costs, failure of the computerized inventory control system, the

profitably of a vital market, the fair market value of related party contracts and acquisition negotiations regarding material leases. Jt. App. 19-23, ¶¶ 33(a), 33(c), 33(d), 33(e); Jt. App. 25, ¶ 37.

If the Court allows contribution in § 10(b) cases, it should deny contribution to Employers in this case, either by applying common law bars to assignment and subrogation or by applying the pari delicto defense as a matter of law to primary wrongdoers who seek contribution from secondary targets.

Respectfully submitted

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS IN SUPPORT OF PETITIONERS

I. INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The National Association of Securities and Commercial Law Attorneys ("NASCAT") is an association of law firms and attorneys located throughout the United States. NASCAT and its members advocate the enactment and enforcement of effective laws to protect investors from deceptive and manipulative practices and to ensure that the United States securities markets operate freely and efficiently. NASCAT's members frequently represent

plaintiffs in a variety of individual, class action and derivative cases prosecuted under the federal securities laws. NASCAT and its members have an interest in the effective private enforcement of the federal securities laws and in the development of case law that effectively deters wrongdoers from perpetrating securities fraud violations upon investors in this country. Accordingly, NASCAT is *strongly opposed* to the judicial creation of an implied cause of action for contribution to benefit those who commit securities fraud prohibited by Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission ("SEC"), 17 C.F.R. § 240.10b-5. NASCAT previously filed an *amicus curiae* brief in this case urging the Court to grant a writ of certiorari. All parties have consented to filing of this *amicus curiae* brief on the merits.

The Ninth Circuit's holding in this case that there is a right to contribution under Section 10(b) cannot be reconciled with this Court's precedents and, therefore, must be reversed. The Ninth Circuit's decision[1] conflicts with this Court's precedents establishing when and how federal courts may create an implied cause of action for contribution to benefit *wrongdoers* liable under a federal statute that does not expressly provide for contribution.[2] *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), hold that a right to contribution may not be created by implication absent legislative intention to create such a cause of action. As detailed herein, no

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[1] The Ninth Circuit's decision is reported as *Employers Ins. of Wausau v. Musick, Peeler & Garrett*, 954 F.2d 575 (9th Cir.), *cert. granted*, No. 92-34, 1992 U.S. LEXIS 5564 (1992).

[2] The court below acknowledged that "[n]o explicit right to contribution is provided for" in Section 10(b) or Rule 10b-5. *Employers Ins.*, 954 F.2d at 577. Nevertheless, the Ninth Circuit stated, "[w]e have recognized . . . that these provisions imply a right of contribution." *Id.* (citations omitted).

such intention can be found under Section 10(b) or Rule 10b-5.

The Ninth Circuit's decision in this case also conflicts with *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), which governs when and how federal courts will imply causes of action under Section 10(b) of the Exchange Act. Although an implied cause of action under Section 10(b) has long been recognized by this Court[3] and has been expressly approved by Congress,[4] the scope of such actions is strictly limited to providing relief to victims of materially misleading statements or omissions and market manipulation. This Court's decision in *Santa Fe Industries* holds that additional causes of action, such as one for contribution among violators of the provision, may not be created under Section 10(b) to serve what is, at best, a subsidiary purpose of Congress when it enacted the statute to prohibit fraud.

In addition, creation of a right to contribution under Section 10(b) is contrary to sound considerations of public policy and would interfere with effective enforcement of the law and is, therefore, inconsistent with congressional intent in enacting the statute. By spreading the cost of a judgment an implied cause of action for contribution seriously undermines the intended deterrent effect of the anti-fraud provisions of the federal securities laws. In addition, a judicially created cause of action for contribution impedes early consensual resolution of securities fraud actions, and greatly complicates litigation of such claims. Judicial creation of a cause of action to benefit those who commit securities fraud is unfair to their victims.

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[3] *See Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196-97 (1976).

[4] In the recently enacted Section 27A of the Exchange Act, for example, Congress expressly provided for reinstatement of implied private civil actions under Section 10(b) that might otherwise be barred by this Court's holding in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773 (1991). *See* 15 U.S.C. § 78aa-1.

For these reasons, NASCAT respectfully submits that the Ninth Circuit's decision in this case should be reversed and this Court should hold that a right to contribution cannot be implied under Section 10(b) or Rule 10b-5.

II. ARGUMENT

A. The Federal Courts May Not Imply A Private Right Of Action For Contribution Under Section 10(b) Of The Exchange Act Or SEC Rule 10b-5 Because Congress Did Not Intend To Provide For One

In *Northwest Airlines* and *Texas Industries*, this Court held that the federal courts may not imply a right of contribution in federal statutes if Congress did not intend to provide for one. Although this Court did not consider in those cases whether an implied cause of action for contribution could be created under Section 10(b) of the Exchange Act or Rule 10b-5 in order to benefit those who commit fraud, the principles set forth in *Northwest Airlines* and *Texas Industries* properly control the question presented here. *See, e.g., Chutich v. Touche Ross & Co.*, 960 F.2d 721, 723 (8th Cir. 1992).

Whether the underlying private right of action is express or implied, the federal courts have applied the *Northwest Airlines* and *Texas Industries* analytical framework in determining whether to create a right of action for contribution.[5] In *Chutich*, where the Eighth Circuit

[5] *See Mortgages, Inc. v. United States District Court*, 934 F.2d 209, 213 (9th Cir. 1991) (refusing to create right of contribution among participants in scheme to defraud federal government under False Claims Act); *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 27-28 (1st Cir. 1990) (declining to create a right of contribution under the Commodity Exchange Act); *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 92 n.6 (1st Cir. 1990) (refusing to use common law to create a right of contribution against settlor of a CERCLA suit); *Ridenour v. Andrews Federal Credit Union*, 897 F.2d 715, 722 (4th Cir. 1990) (refusing to create a common law right to sue under the Federal Credit Union Act); *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1191 (7th Cir. 1989) (no right of contribution under Tax Code § 6672(a)); *Getty Petroleum Corp. v. Island Transp. Corp.*, 862 F.2d 10, 16 (2d Cir. 1988) (refusing to create a common law right of contribution under the Lanham Act's trademark infringement provisions), *cert. denied*, 490 U.S. 1006 (1989); *Green v. United States Dept. of Labor*, 775 F.2d 964, 971 (8th Cir. 1985) (finding no implied right to contribution or indemnity under § 8132 of Federal Employees' Compensation Act); *Friedman v. Hartmann*, 787 F. Supp. 411, 415-18 (S.D.N.Y. 1992) (refusing to find right of contribution under RICO); *Biben v. Card*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,512, at 92,331 n.2 (W.D. Mo. 1991) (no contribution under Section 10(b)); *Nelsen v. Craig-Hallum, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,500, at 93,192-93 (D. Minn. 1989) (no contribution under Section 10(b)); *In re Professional Financial Management, Ltd.*, 683 F. Supp. 1283, 1285-87 (D. Minn. 1988) (no contribution under Section 10(b)); *Robin v. Doctors Officenters Corp.*, 730 F. Supp. 122, 124 (N.D. Ill. 1989) (no contribution under Section 10(b)).

held that the federal courts have no power to create a right of action for contribution among violators of Section 10(b) and Rule 10b-5, the court stated that "the analytical framework in *Texas Industries* applies to this case," noting that "the failure to follow *Texas Industries* in cases in which the underlying private right of action is implied rather than express would create a double standard for implying rights of action for contribution." 960 F.2d at 723. Circuit courts have also applied the *Northwest Airlines/Texas Industries* analytic framework in determining whether a right to indemnification exists under the securities laws.[6] No other standard may be followed here and,

[6] *See, e.g., King v. Gibbs*, 876 F.2d 1275, 1280-82 (7th Cir. 1989) (declining to create right to indemnification under Section 10(b) of the Exchange Act); *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1106 (4th Cir. 1989) (refusing to create right to either contribution or indemnification under Section 12(2) of

as noted above (*see supra* note 2), the Ninth Circuit did not offer one. *See Employers Ins.*, 954 F.2d at 577.

An analysis of this Court's decisions in *Northwest Airlines* and *Texas Industries* precludes the implication of contribution rights under Section 10(b) and Rule 10b-5 and mandates reversal of the Ninth Circuit's decision in this case. In *Northwest Airlines*, plaintiff Northwest Airlines sought contribution from labor unions for a judgment rendered against the airline in a class action brought under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 and complaining of discriminatory pay practices against female flight attendants.[7] The Court held that the "ultimate question" in such cases is "whether Congress intended to create the private remedy for . . . contribution." 451 U.S. at 91. Justice Stevens observed that the relevant factors include "the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing State remedies." *Id.* (citations omitted). The first factor was easily disposed of because neither the Equal Pay Act nor Title VII "expressly

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the Securities Act of 1933, (the "Securities Act") 15 U.S.C. § 77*l*(2)).

[7] During the period in question, the airline paid higher wages to its male cabin attendants (who were classified as pursers) than to its female cabin attendants (who were classified as stewardesses), both of whom were represented by the Transit Workers Union and, later, by the Airline Pilots Association, International. The basis of the airline's contribution claim against the labor unions was that the employees' wages were fixed by collective bargaining agreements negotiated and executed in response to union demands. 451 U.S. at 80-82.

creates a right to contribution in favor of employers." *Id.* at 93. Similarly, as the Eighth Circuit more recently concluded in *Chutich*, 960 F.2d at 722-23, neither Section 10(b) nor Rule 10b-5 expressly creates a right to contribution.[8]

In *Northwest Airlines*, Justice Stevens observed that a cause of action for contribution might be implied "if, among other things, the language of the statutes indicates that they were enacted for the special benefit of a class of which the [party seeking contribution] is a member." 451 U.S. at 91-92 (citation omitted). This Court held that no right to contribution could be implied from the statutory language, however, because "it cannot possibly be said

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[8] In this case, the Ninth Circuit agreed, stating that no "explicit right to contribution is provided for" in Section 10(b) or Rule 10b-5. *Employers Ins.*, 954 F.2d at 577. In *Northwest Airlines*, Justice Stevens noted that Congress "expressly provided" for contribution among joint wrongdoers *only* in Section 11(f) of the Securities Act, 15 U.S.C. § 77k(f), and in Sections 9(e) and 18(b) of the Exchange Act, 15 U.S.C. §§ 78i(e), 78r(b), stating that "when Congress wanted to provide a right to contribution, it did so expressly." 451 U.S. at 92 n.24. As one district court has read footnote 24 of the *Northwest Airlines* opinion, Congress' failure to provide an explicit right to contribution under Section 12(2) of the Securities Act, 15 U.S.C. § 77*l*(2), and Section 10(b) of the Exchange Act "suggests that it did not intend to provide for contribution under those sections." *Professional Financial Management*, 683 F. Supp. at 1286. The *Northwest Airlines* Court also observed that the Second and Seventh Circuits had previously recognized an implied right to contribution under other provisions of the federal securities laws where the underlying liability resulted from an implied private right of action, but declined to address "the merit of this reasoning." 451 U.S. at 92 n.24. As the Eighth Circuit has subsequently stated, these early circuit court decisions either predate this Court's controlling decisions in *Northwest Airlines* and *Texas Industries*, simply follow earlier precedent without considering this Court's decisions, or have been subsequently overruled in their respective Circuits. *See Chutich*, 960 F.2d at 723; *see also King v. Gibbs*, 876 F.2d at 1280 n.8; *Robin*, 730 F. Supp. at 124.

that employers are members of the class for whose especial benefit either the Equal Pay Act or Title VII was enacted," *id.* at 92 (citation omitted):

> To the contrary, both statutes are expressly directed against employers; Congress intended in these statutes to regulate their conduct for the benefit of employees. In light of this fact, [an employer held liable under these statutes] "can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection."

Id. (footnote omitted) (quoting *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 37 (1977)). Similarly, as detailed below, it cannot be said that Section 10(b) or Rule 10b-5 were enacted or promulgated for the benefit of persons who violate the securities laws.

Finally, the *Northwest Airlines* Court held that no principles of federal common law permit a court to fashion a cause of action for contribution where Congress did not intend to provide one. *Id.* at 95-98. Similarly, the federal courts do not have authority under Section 10(b) or Rule 10b-5 to fashion a federal common law rule of contribution, because contribution does not implicate uniquely federal interests of the kind that oblige courts to fashion federal common law and because the Exchange Act contains no provision giving federal courts broad power to develop a federal common law to benefit those who commit securities fraud. *See Chutich*, 960 F.2d at 724.

In *Northwest Airlines*, this Court left open the question whether contribution could be implied under the antitrust laws. 451 U.S. at 98 n.42. Five weeks later, however, in *Texas Industries*, this Court applied the *Northwest Airlines* analytical framework and held that no implied cause of action for contribution may be created under either the Sherman or Clayton Acts because, *inter alia*, those statutes "were not adopted for the benefit of the participants in a conspiracy to restrain trade." 451 U.S. at 639.

In *Texas Industries*, a construction company which had purchased concrete from a manufacturer and seller of ready-mixed concrete charged that the manufacturer and certain unnamed concrete firms had conspired to raise prices in violation of Section 1 of the Sherman Act. Through discovery, the defendant manufacturer learned of the certain other concrete producers that had participated in the alleged price-fixing scheme and filed a third-party complaint seeking contribution from them should it be held liable in the action filed by the construction company. In its decision, this Court noted that the federal antitrust laws do not expressly establish a right of action for contribution and rejected the view that such a right exists by implication under the antitrust laws. 451 U.S. at 639-40.[9] Chief Justice Burger emphasized the deterrent purpose of the Sherman and Clayton Acts:

> [I]t is . . . clear that the Sherman Act and the provision for treble-damage actions under the Clayton Act were not adopted for the benefit of the participants in a conspiracy to restrain trade. On the contrary, [the concrete manufacturer] "is a member of the class whose activities Congress intended to regulate for the protection and benefit *of an entirely distinct class.*" The very idea of

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[9] Writing for the Court, Chief Justice Burger noted that the parties and various amici had discussed how a right to contribution should be structured and, in particular, "how to treat problems that may arise with the allocation of damages among the wrongdoers and the effect of settlements." *Id.* at 637. Without reaching a decision, this Court acknowledged that "[i]n addition to the question of allocation, a right to contribution may have a serious impact on the incentive of defendants to settle," *id.*, and observed that "[r]egardless of the particular rule adopted for allocating damages or enforcing settlements, the complexity of the issues involved may result in additional trial and pretrial proceedings, thus adding new complications to what already is complex litigation." *Id.* at 638. As noted below, similar public policy considerations are raised by the question presented in this case. *See infra* Part II.C.2.

> treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.

Id. at 639 (emphasis in original) (quoting *Piper*, 430 U.S. at 37). Once again, as in *Northwest Airlines*, this Court held that nothing in principles of federal common law could justify creation of an implied cause of action for contribution. *Id.* at 640-46.

Taken together, this Court's decisions in *Northwest Airlines* and *Texas Industries* compel the conclusion that federal courts should not create a right of action for contribution among violators of Section 10(b) or Rule 10b-5. In its well-reasoned decision in *Chutich*, 960 F.2d at 722-24, the Eighth Circuit concluded that there is no basis for implying a right of action for contribution in the first way provided in *Texas Industries* – through congressional intent. This Court's precedent prohibits implication of a right to contribution under Section 10(b) or Rule 10b-5 if they were not designed for the "especial benefit" of those who commit securities fraud.

As detailed herein, this statute and rule were no more designed to protect those who defraud investors than were the Equal Pay Act and Title VII designed to protect employers, *see Northwest Airlines*, 451 U.S. at 92, or the antitrust laws were designed to protect those who conspire in restraint of trade, *see Texas Industries*, 451 U.S. at 639. Instead, Section 10(b), as a part of the Exchange Act, was "designed to protect investors against manipulation of stock prices," *Basic*, 485 U.S. at 230, by "implementing a 'philosophy of full disclosure.' " *Santa Fe Industries*, 430 U.S. at 477-78 (citation omitted). By its own terms, Section 10(b) authorizes promulgation of rules and regulations that are "in the public interest *or for the protection of investors*." 15 U.S.C. § 78j(b) (emphasis added). Thus, Rule 10b-5 fulfills the same public purposes, and the statute and rule are *not* for the protection of those who commit securities fraud. Under this Court's decisions in *Northwest Airlines* and *Texas Industries*, no cause

of action for contribution may be judicially implied under Section 10(b) or Rule 10b-5.[10]

B. This Court's Decisions Governing The Scope Of Actions That May Be Implied Under Section 10(b) Prohibit The Creation Of A Right To Contribution To Benefit Wrongdoers As A Matter Of Federal Common Law

As the Eighth Circuit stated in *Chutich*, federal courts "have authority to formulate federal common law in two narrow situations: when 'a federal rule of decision is "necessary to protect uniquely federal interests," and [when] Congress has given the courts the power to develop substantive law.' " 960 F.2d at 724 (quoting *Texas Industries*, 451 U.S. at 640). In *Texas Industries*, this Court held that "contribution does not implicate 'uniquely federal interests' of the kind that oblige courts to formulate federal common law." 451 U.S. at 642; *see also Chutich*, 960 F.2d at 724. Nevertheless, a few district court decisions hold that because the private cause of action under Section 10(b) and Rule 10b-5 arises by judicial implication, courts are free to create an implied cause of action for contribution without regard to legislative intent or the usual limitations on such judicial lawmaking.[11]

These decisions correctly observe that the private cause of action under Section 10(b) and Rule 10b-5 arises by judicial implication and has been shaped through a process of common law adjudication. As this Court

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[10] *See Chutich*, 960 F.2d at 724; *Biben*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,512, at 92,331 n.2; *Nelsen*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,500, at 93,192-93; *Professional Financial Management*, 683 F. Supp. at 1285-87; *Robin*, 730 F. Supp. at 124.

[11] *See, e.g., Baker v. BP America, Inc.*, 749 F. Supp. 840, 842-44 (N.D. Ohio 1990); *In re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. 597, 615-16 (N.D. Ill. 1987).

explained in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975):

> When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn. Such growth may be quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it . . . .

Id. at 737 (citation omitted). It does not follow, however, that because the private cause of action under Section 10(b) and Rule 10b-5 is itself an implied cause of action – that is defined by a developing common law of judicial decisions – the federal courts should create a right to contribution to benefit those who violate the statute and rule.

As the Eighth Circuit correctly held in *Chutich*, "[b]ecause federal courts implied the private right of action for substantive violations of section 10(b) and Rule 10b-5, federal courts have discretion to award appropriate relief *to plaintiffs* pursuing that right of action."[12] "It does not follow, however, that federal courts have common law power to create a new right of action for contribution accruing *to defendants*." *Chutich*, 960 F.2d at 724 (emphasis added) (citing *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S. Ct. 1028, 1037 (1992), and *Texas Industries*, 451 U.S. at 97).

Lower court decisions creating a right to contribution conflict irreconcilably with this Court's precedents limiting the nature and scope of actions that may judicially be created under Section 10(b) and Rule 10b-5. In *Santa Fe Industries*, 430 U.S. at 477-78, for example, this Court held that the implied cause of action arising under Section 10(b) *may not* be extended to actions that serve a subsidiary purpose of the statute and are not necessary to the fundamental protection of investors, stating that, "[a]lthough we have recognized an implied cause of

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[12] *Chutich*, 960 F.2d at 724 (emphasis added). The implied action under Section 10(b) has been explicitly endorsed as such by Congress. *See supra* note 4.

action [under Section 10(b)] in some circumstances, we have also recognized that *a private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is 'unnecessary to ensure the fulfillment of Congress' purposes' in adopting the Act*." *Id.* at 477 (citations omitted, emphasis added).

One fundamental purpose of the securities laws generally, and of Section 10(b) in particular, is to guarantee full disclosure of information about securities and to prevent fraud. This statutory provision is part of a legislative enactment which was "designed to protect investors against manipulation of stock prices," *Basic*, 485 U.S. at 230, by "implementing a 'philosophy of full disclosure.' " *Santa Fe Industries*, 430 U.S. at 477-78. In addition, under Section 10(b) Congress did not authorize the SEC to prescribe rules or regulations *for the benefit of* those who commit securities fraud.[13] Instead, Congress authorized the SEC to promulgate such rules and regulations as are "necessary or appropriate in the public interest or *for the protection of investors*." 15 U.S.C. § 78j(b) (emphasis added). Thus, the SEC promulgated Rule 10b-5 thereunder *to outlaw fraud*, not to protect those who commit fraud. The Commission has never purported to promulgate any rule that would create a right to contribution to benefit those who commit securities fraud.

Moreover, only a small portion of the statutory provisions imposing express liability under the securities laws create an additional right to contribution for those who are held liable thereunder. *See* Mark J. Loewenstein, *Implied Contribution Under The Federal Securities Laws: A Reassessment*, 1982 Duke L.J. 543, 550. Thus, Judge Renner

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[13] *Cf. King v. Gibbs*, 876 F.2d at 1281 ("[W]e cannot infer from the language of Section 10(b) or Rule 10b-5 a congressional intent to permit indemnification of those who were either alleged to have engaged in the deceptive and manipulative practices or those who have been proven guilty of utilizing such practices.").

has persuasively argued that congressional intent to create a right to contribution under Section 10(b) cannot be implied:

> No argument has been presented that persuades the Court that the defendants in § 10(b) actions constitute persons Congress intended to comprehensively protect when it passed the securities laws. . . . The Court agrees . . . that the fact that Congress provided express rights to contribution for three out of the seven express remedies provided in the securities laws is not persuasive of intent with regard to § 10(b). Defendant contends that the standard for implication of contribution rights is such that no defendants would ever be considered part of a group Congress intended to protect by its legislation. The Court disagrees. If Congress had, for example, enacted express rights of contribution for *all* the express causes of action in the securities laws, a persuasive argument could be made that contribution should also exist for implied causes of action.

Chutich v. Green Tree Acceptance, Inc., 759 F. Supp. 1403, 1407 (D. Minn. 1991) (emphasis in original, citation omitted), *aff'd sub nom. Chutich v. Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992); *accord Robin*, 730 F. Supp. at 124. Allocating responsibility among those who commit fraud from full liability for their wrongs is, *at best*, a subsidiary purpose of the securities laws. In *Santa Fe Industries*, this Court held that federal courts are *not* authorized under Section 10(b) to create private causes of action "to serve what is 'at best a subsidiary purpose' of the federal legislation." *Id.* at 478.

Therefore, Congress has not given the courts the power to develop substantive law of contribution under Section 10(b), *see Texas Industries*, 451 U.S. at 640; *Chutich*, 960 F.2d at 724, and nothing in this Court's Section 10(b) jurisprudence permits courts to create a right to contribution thereunder.

C. Creation Of A Right To Contribution Is Contrary To Public Policy Underlying Section 10(b) And Rule 10b-5

Section 10(b) and Rule 10b-5 provide investors with significant protections from fraudulent practices in the securities markets.[14] The statute was expressly intended as "a comprehensive antifraud provision operating even when more specific laws have no application."[15] Although Congress gave the SEC the primary role in enforcing this provision, private suits brought under Section 10(b) constitute "an essential tool for enforcement of the [Exchange] Act's requirements," *Basic*, 485 U.S. at 231, and are " 'a necessary supplement to [SEC] action.' " *Bateman, Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

This Court has made it clear that rules facilitating Section 10(b) litigation "support[] the congressional policy embodied in the [Exchange] Act" of combating all forms of securities fraud. *Basic*, 485 U.S. at 245. This Court has also stated that "Congress' aim in enacting the [Exchange] Act was not confined solely to compensating investors;" rather, "Congress intended to *deter fraud and manipulative practices* in the securities markets, and to insure full disclosure of information material to investment decisions." *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986) (emphasis added, citations omitted); *see also Huddleston*, 459 U.S. at 386-87 (primary policy embodied by

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[14] *See Basic*, 485 U.S. at 230 ("The [Exchange] Act was designed to protect investors against manipulation of stock prices.") (citing S. Rep. No. 792, 73d Cong., 2d Sess. 1-5 (1934)).

[15] *Lampf, Pleva, Lipkind, Prupis & Petigrow*, 111 S. Ct. at 2789 (Kennedy and O'Connor, JJ., dissenting); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 386 (1983) (referring to "the broad proscription against fraud in [Section] 10(b)").

Congress in the Exchange Act is the punishment and deterrence of securities violations).

Creation of a right to contribution to benefit those who commit securities fraud prohibited by Section 10(b) and Rule 10b-5 is contrary to public policy underlying the statute and the rule for several reasons described below. Allowing wrongdoers to spread the cost of judgment through an implied cause of action for contribution seriously undermines the Exchange Act's undisputed deterrent purpose. Contribution also runs contrary to the public policy encouraging private enforcement of the securities laws because it discourages and penalizes settlement. The creation of a right to contribution greatly complicates the prosecution of securities fraud actions and it can also be expected to burden the courts by creating second and third generations of litigation, even after the initial case settles or is otherwise resolved. As a consequence of these factors, considerations of equity and judicial economy also greatly weigh against creation of a right to contribution to benefit those who are liable for committing securities fraud.

1. Creation Of A Right To Contribution Lessens Deterrence

Proponents of contribution invariably contend that contribution promotes public policy by enhancing the deterrent effect of the securities laws and several courts have created a right to contribution based on this rationale.[16] They are wrong. Contribution actually acts as "a

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[16] Lower courts that have created an implied right to contribution under Section 10(b) have done so based on the fallacious assumption that contribution furthers public policy because it enhances the deterrent effect of the securities laws and on the misguided notion that considerations of equity and fairness among wrongdoers favor contribution. *See, e.g., Smith v. Mulvaney*, 827 F.2d 558, 561 (9th Cir. 1987). In *Texas Industries* and *Northwest Airlines*, however, this Court held that neither public policy nor equity is sufficient to justify the creation of a right to contribution where Congress did not clearly intend to create one. *Texas Industries*, 451 U.S. at 638; *Northwest Airlines*, 451 U.S. at 89-90, 98 n.41.

form of liability insurance, because it reduces the variance of the ex post outcomes in joint tortfeasor cases." William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 203 (1987). Like liability insurance, it allows those who commit fraud to spread the costs of liability if they get caught.

The uninformed may think that a rule of no contribution might "lead to underdeterrence, *but it does not*." Richard A. Posner, *Economic Analysis of Law* 172-73 (3d ed. 1986) (emphasis added). Thus, although courts "have uniformly offered deterrence as a rationale for allowing contribution, thoughtful contemporary analysis indicates that a rule denying contribution in rule 10b-5 actions may actually operate as a greater deterrent than a rule permitting contribution." Loewenstein, *Implied Contribution*, 1982 Duke L.J. at 573. Whatever the proponents of contribution may say, responsible economic analysis "clearly refutes the argument that contribution should be favored because it yields more deterrence than no contribution, for the contrary is true." Frank H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. Law & Econ. 331, 353 (1980).

A "rule of no contribution provides greater deterrence" to wrongdoing than can "any rule of contribution." *Id.* at 332.[17] Moreover, the effect of contribution in

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[17] Several circuit court decisions have acknowledged this point. In *Wilson P. Abraham Constr. Corp. v. Texas Industries, Inc.*, 604 F.2d 897, 903 & n.11 (5th Cir. 1979), *aff'd sub nom. Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), the Fifth Circuit stated that a rule denying contribution "may very well enhance the [antitrust] statutes' deterrent effect by preventing a defendant from cutting its losses." Similarly, in *Baker, Watts*, 876 F.2d at 1105-06, the Fourth Circuit observed that "[a]n even greater deterrent effect may exist if a single securities wrongdoer . . . is held liable for the total adverse judgment." *Compare Olympia Brewing*, 674 F. Supp. at 616

lessening deterrence is greatly compounded by a contribution bar rule federal courts have adopted to implement the purported right when plaintiffs settle with one of several jointly liable defendants. The unfortunate effects of creating an implied right of contribution, in connection with settlement of litigation, are described in the following section.

2. A Judicially Created Cause Of Action For Contribution Discourages Settlement

A judicially created cause of action for contribution is contrary to public policy because it discourages settlement of litigation. In *Texas Industries*, this Court recognized in the antitrust context that "a right to contribution may have a serious impact on the incentive of defendants to settle." 451 U.S. at 637. A rule against contribution encourages settlement and promotes equity because "[t]he competition to settle will *magnify* the relative payment of the more culpable parties." Easterbrook, Landes & Posner, *Contribution*, 23 J. Law & Econ. at 354, 360; *see also id.* at 368-70 (demonstrating this). Thus, *any* rule of contribution this Court might create will make settlement more difficult.

However, its deleterious impact is greatly increased by the way some federal courts have implemented the right to contribution in securities fraud actions. In decisions such as *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 232 (1990), federal courts have held that if plaintiffs settle with one of several defendants and agree to bar the remaining defendants' right to contribution, the plaintiffs thereby forfeit their right to be made whole when liability is established after trial. These cases hold that if one of

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n.20 ("contemporary analysis exists indicating that a rule denying contribution in section 10(b) cases may provide as great a deterrent to future wrongdoing as a rule permitting contribution") (citing Easterbrook, Landes & Posner, *Contribution*, 23 J. Law & Econ. at 349). No decision that adopts contribution to enhance deterrence can claim to be based on sound economic analysis.

several defendants settles an action so that claims for contribution against it will be barred, plaintiff's eventual judgment against the remaining defendants must be reduced by the settling defendant's proportionate culpability.[18] By creating and then implementing the right to contribution with the "proportionate fault" or *Kaypro* rule these decisions have greatly reduced (and often even eliminated) incentives to settle and have made the prosecution of meritorious cases much more difficult.

The effects of such a rule are important. Typically, in instances of securities fraud, a number of defendants have acted together to perpetrate the fraud.[19] Some of these culpable parties are usually more solvent than others who may

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[18] The Ninth Circuit and various district courts in the Third, Fourth and Tenth Circuits have adopted the proportionate fault setoff method. *See Kaypro*, 884 F.2d at 1231; *In re Granada Partnership Securities Litigation*, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶96,851, at 93,442-43 (S.D. Tex. 1992); *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 772 F. Supp. 1565, 1571 (D.S.C. 1991); *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 552-53 (D. Colo. 1989), *appeal dismissed as moot*, 936 F.2d 582 (10th Cir. 1991); *In re Sunrise Securities Litigation*, 698 F. Supp. 1256, 1261 (E.D. Pa. 1988). Fortunately, the federal courts are *not* unanimous in embracing the *Kaypro* rule. The Second Circuit and district courts in the First, Fifth, Seventh and Eighth Circuits have analyzed and adopted the *pro tanto* offset method. *See, e.g., Singer v. Olympia Brewing Co.*, 878 F.2d 596, 600 (2d Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990); *Biben*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,512, at 92,232-33; *MFS Municipal Income Trust v. American Medical Int'l, Inc.*, 751 F. Supp. 279, 281-86 (D. Mass. 1990); *Dalton v. Alston & Bird*, 741 F. Supp. 157, 159-60 (S.D. Ill. 1990); *In re Terra-Drill Partnerships Securities Litigation*, 726 F. Supp. 655, 656-57 (S.D. Tex. 1989); *see also* Wm. Bruce Davis, Comment, *Multiple Defendant Settlement in 10b-5: Good Faith Contribution Bar*, 40 Hastings L.J. 1253 (1989). Alternative rules are discussed below, in Part II.D of this brief.

[19] *See, e.g., In re American Continental Corp./Lincoln Savings & Loan Securities Litigation*, 794 F. Supp. 1424 (D. Ariz. 1992) (denying defendants' motions for summary judgment in Section

even be bankrupt or have no collectible assets. In addition, plaintiffs occasionally find that their case against a given defendant is not as strong as they reasonably believed when they initially filed suit. For these and other reasons, it often makes good sense for plaintiffs to settle with some defendants in order to prosecute the case through trial against those who remain – and who should be liable to make plaintiffs whole for their entire loss under principles of joint and several liability. Of course, this makes sense for the settling defendants only if the remaining defendants cannot obtain contribution from a settling defendant after they are themselves held liable. Otherwise, a defendant has no incentive to settle.[20]

Unfortunately, much of the applicable case law now holds that if plaintiffs settle with one of several defendants and bar the right to contribution of the remaining defendants they thereby forfeit their right to be made whole when liability is established after trial: the "proportionate fault" or *Kaypro* rule requires the judgment against the remaining defendants to be reduced by the proportionate fault of the defendants who settled.[21] By denying plaintiffs the right to be made whole for their losses, the right to contribution discourages reasonable settlements by making them too costly for plaintiffs to bear.[22] It also

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10(b) class action alleging conspiracy between officers and directors, accountants, attorneys, consultants and investment bankers).

[20] *See Kaypro*, 884 F.2d at 1229; *Miller v. Apartments & Homes of New Jersey, Inc.*, 646 F.2d 101, 109 (3d Cir. 1981); *In re Nucorp Energy Securities Litigation*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987) ("Anyone foolish enough to settle without barring contribution is courting disaster.").

[21] *See supra* note 18.

[22] Plaintiffs' incentive to settle claims before trial is further reduced because the monetary amount of the proportionate fault set-off is unknown until after trial. Plaintiffs' inability to gauge the effect of settlement on their total recovery is particularly critical in numerous securities fraud class actions because

reduces the exposure of defendants to the extent settlements still occur because settlements can only reduce the overall liability faced by those who practiced fraud.[23]

To illustrate this, one may consider the case of plaintiffs who suffered total damages of $10 million as a consequence of a securities fraud perpetrated by several defendants. If they proceed to trial and obtain judgment against defendants then plaintiffs are entitled, under principles of joint and several liability, to recover their entire loss of $10 million. If there is no right to contribution and they settle with one defendant for $100,000, they will be able to proceed to trial and obtain a favorable judgment for the entire $10 million and their recovery against the trial defendants will then be reduced by the $100,000 obtained in settlement. Thus, plaintiffs recover the entire loss of $10 million, and the purposes of the Section 10(b) to protect investors and deter fraud are given full effect.

If there is a right to contribution, however, under cases like *Kaypro* the amount which defrauded plaintiffs can recover after trial may be greatly reduced. If the individual defendant who settled out for $100,000 is found by the jury to be ten per cent (10%) culpable, the judgment will then be reduced not by the $100,000 actually paid but by ten per cent (10%) or $1 million, and plaintiffs will recover only $9 million from the remaining defendants – for a total recovery of $9.1 million – after a plaintiffs' verdict. If the individual

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the uncertainty inherent in a proportionate fault scheme makes it difficult to frame a notice to the class reflecting the terms of settlement. *See In re Atlantic Financial Management, Inc. Securities Litigation*, 718 F. Supp. 1012, 1018 (D. Mass. 1988). Because the amount of set-off cannot be determined until after trial is conducted with the non-settling defendants, plaintiffs may be unable to advise the class as to whether a proposed pretrial settlement is fair.

[23] *See* Landes & Posner, *The Economic Structure of Tort Law* 203 (noting that a proportionate fault rule "results in lower recoveries").

defendant who settled out for $100,000 is found to be fifty per cent (50%) culpable, then the judgment against the remaining defendants will be reduced by $5 million, and the plaintiffs, who lost $10 million, recover a total of only $5.1 million. Recognition of a right to contribution therefore costs the victims of fraud $4.9 million *and* gives defendants who committed fraud a windfall of $4.9 million in relief from full joint liability for their wrongs. *Recognition of a right to contribution effectively transfers wealth from victims of fraud to those who practiced it upon them.* This frustrates Section 10(b)'s dual purposes of protecting investors and deterring fraud.

The only way for defrauded plaintiffs to avoid such problems is to refuse to settle with one or more of several defendants – even if those defendants who wish to settle are willing to pay everything they own in settlement! If plaintiffs settle with a defendant, they can expect those who remain in the case to point to that person as the ringleader in order to convince the jury that he, she, or it was ninety per cent (90%) culpable – solely to correspondingly reduce their own liability to the injured investors. This puts plaintiffs in the position of *defending* the conduct of persons they had sued, but settled with, thereby greatly complicating effective trial prosecution.

To the extent settlements still *can* be achieved, recognition of contribution with the *Kaypro* rule will greatly reduce the deterrent effect of the securities laws because the right to be made whole is lost, and the ultimate recovery is likely to be reduced greatly whenever plaintiffs settle and agree to bar contribution against the settling defendants. This is, of course, absolutely contrary to the powerful public policy that favors effective private enforcement of Section 10(b) and Rule 10b-5.

3. Creation Of A Right To Contribution Would Place Unnecessary Burdens On Litigants And The Courts

Another consideration weighing against judicial creation of a right to contribution is the burdensome effects

the implied right would have on prosecution of meritorious litigation, and on the courts. "Anyone who thinks that contribution is procedurally straightforward will be disabused of this notion by dipping into the legal literature."[24] In the words of this Court, "[d]ividing or apportioning damages among a cluster of co-conspirators presents difficult issues, for the participation of each in the conspiracy may have varied." *Texas Industries*, 451 U.S. at 637. "Regardless of the particular rule adopted for allocating damages or enforcing settlements, the complexity of the issues involved may result in additional trial and pretrial proceedings, thus adding new complications to what already is complex litigation." *Id.* at 638.

Considerations of simplicity and judicial economy weigh heavily against creation of new rights to contribution. There is no question that a regime which provides for contribution "is more costly to administer than no contribution, because it requires the courts to decide another issue and supervise another set of transfer payments." Posner, *Economic Analysis of Law* at 173. Further, a no-contribution rule economizes on administrative costs, compared to contribution, because there is no subsequent action "between injurers to determine how the burden of the tort judgment should be shared in the event deterrence breaks down and [a violation] occurs." Richard A. Posner, *Tort Law: Cases and Economic Analysis* 621 (1982).

We have seen that some federal courts define and implement the right to contribution in a fashion that requires the *relative culpability* of all defendants, both those who are on trial *and those who have settled out of the case*, to be adjudicated.

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[24] William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 201 n.13 (citing John G. Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*, 30 Hastings L.J. 1464, 1485-1514 (1979); Stuart M. Gordon & Diane R. Crowley, *Indemnity Issues in Settlement of Multi-Party Actions in Comparative Negligence Jurisdictions*, 48 Ins. Counsel J. 457 (1981)).

See supra Part II.C.2. Obviously, this practice makes the trial of securities fraud litigation far more difficult than it needs to be with respect to the burden on both litigants and on judicial resources. Further, it removes all benefits that partial settlement of a case might have in simplifying trial of the matter.

In addition, contribution can cause further problems even if plaintiffs settle with *all* of the defendants named in an action, *as happened in this case*. Claims for contribution asserted in the courts below have spawned a second generation of litigation after the initial action for securities fraud was *completely settled* by the parties to it. The Ninth Circuit's recognition of a right to contribution in this case has spawned years of satellite litigation with appeals all the way to this Court. If this Court holds that there *is* a right to contribution, and the defendants in this case are required to pay, they could themselves file yet another action: a third generation of litigation seeking to hold still others accountable for contribution to *them*!

While it will burden the courts, none of this surplus litigation does anything to advance the purposes underlying Section 10(b) and Rule 10b-5. A rule that permits contribution in any form "entails costly suits among injurers attempting to shift part of the victim's loss away from the defendant(s) on whom the victim levied judgment – suits with ex post distributive consequences but no impact on incentives for efficient accident [or fraud] avoidance." Landes & Posner, *The Economic Structure of Tort Law* 201-02.

4. Creation Of A Right Of Contribution To Benefit Wrongdoers Is Contrary To Fundamental Principles Of Equity And Fairness

Creating a right to contribution on behalf of those who committed fraud is *fundamentally unfair* to their victims, who are forced to bear the extra burdens of proving a case in which rights to contribution will also be tried. It is *fundamentally unfair* to victims who can settle claims

against one of several defendants only by forfeiting the right to be made whole.

After careful consideration of all the arguments for, and against, implication of a cause of action for contribution under Section 10(b), Professor Loewenstein concluded that "it may be unfair to permit a rule 10b-5 defendant to seek contribution." Loewenstein, *Implied Contribution*, 1982 Duke L.J. at 558. He explained:

> The contribution aspects of a case might substantially complicate an already complicated securities fraud case. The original defendant would have to implead third-party defendants and prove their culpability, thus delaying the plaintiff's case or causing confusion among the members of the jury. If the court decides to adopt a rule of comparative culpability in determining the portion of the judgment each defendant must contribute, further complexity is added and the cost of administering the securities laws increases. It may indeed be fairer to let the plaintiff control the litigation and choose the defendants while denying the guilty defendants the right to seek contribution.

Id. at 558-59.

Fairness considerations weigh against implication of a right to contribution where the underlying liability is based on a finding of scienter, as it is under Section 10(b) and Rule 10b-5. *See* Easterbrook, Landes & Posner, *Contribution*, 23 J. Law & Econ. at 341. As Professor Loewenstein explains:

> The Supreme Court has held that *scienter* is required to establish liability under Section 10(b). That is, the defendant must have acted with an intent to defraud. Because common law courts have traditionally been unwilling to provide a right to contribution when the defendant seeking contribution committed an intentional tort or acted recklessly, the federal courts should be reluctant to find a right to contribution under Rule 10b-5 . . . .

1982 Duke L.J. at 551-52. Thus, "the nature of a rule 10b-5 action, requiring as it does proof that the defendant acted with *scienter*, suggests that it is not unfair to deny contribution in such actions." *Id.* at 573. *Accord Professional Financial Management*, 683 F. Supp. at 1287 ("Because scienter is required for liability under Rule 10b-5, it is also not unfair to deny contribution in such actions.").

In *Texas Industries*, Professor Loewenstein observes, this Court reiterated "the traditional reason for denying contribution among intentional tortfeasors: 'traditional equitable standards have something to say about the septic state of the hands of such a suitor in the courts, and, in the context of one wrong doer suing a co-conspirator, these standards similarly suggest that parties generally *in pari delicto* should be left where they are found.' " Loewenstein, *Implied Contribution*, 1982 Duke L.J. at 558 n.84 (quoting *Texas Industries*, 451 U.S. at 635); *compare Pinter v. Dahl*, 486 U.S. 622, 632-35 (1988) (applying *in pari delicto* principle to securities fraud claims).

Denying contribution to wrongdoers who act with scienter is by no means unfair. Anyone who wishes to avoid liability can easily do so by choosing not to commit securities fraud. Those who choose to risk liability by committing violations of Section 10(b) and Rule 10b-5 have no claim to equitable consideration that might counterbalance the inherent unfairness *to their victims* of creating a judicially implied right of contribution.

Thus, while considerations of equity cannot justify judicial *creation* of a right to contribution, *see Texas Industries*, 451 U.S. at 638; *Northwest Airlines*, 451 U.S. at 89-90, 98 n.41, they should be sufficient to *defeat* creation of a cause of action for contribution under Section 10(b) and Rule 10b-5 because a central purpose of the statute and rule is to protect investors from fraud. If creation of an implied right is unfair to the victims of securities fraud perpetrated in violation of Section 10(b) and Rule 10b-5, it runs counter to the very purpose of the statute and rule. Judicial creation of such a right is improper.

D. If This Court Creates A Right To Contribution Under Section 10(b) It Should Define The Right In A Way That Minimizes Its Deleterious Effects

If this Court creates a right to contribution, it should define that right in a way that at least minimizes its deleterious effects. This Court should expressly repudiate the *Kaypro* rule which, as we have shown, impairs settlement, complicates litigation, prevents victims of fraud from being made whole, and reduces the deterrent effect of the securities laws. This Court should *not* create a right to contribution without giving lower courts and litigants some indication of just *what* that right to contribution *is*.

By definition contribution governs the allocation of liability among multiple defendants. Thus, in creating a right to contribution, this Court should explain *how* that liability is to be allocated. It could be allocated *pro rata* so that liability is divided equally among all those who perpetrated the fraud. It could be allocated based either on pretrial or post trial findings of relative fault, or it could be allocated based on the *pro tanto* rule. When a defendant settles and bars claims for contribution this could result in a *pro rata*, *pro tanto*, or proportionate reduction in the damages that may be collected from the remaining defendants.[25]

The *pro tanto* rule is clearly preferable in light of the Congressional policy inherent in Section 10(b) that fraud should be deterred and its victims made whole. In *Miller* the Third Circuit recognized that:

> [The] law generally seeks to assure the tort victim neither more nor less than one complete satisfaction of his claim. A rule of *pro tanto*

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[25] *See, e.g., In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 161 n.3 (4th Cir. 1991) (describing the three methods); *Miller*, 646 F.2d at 109 (comparing *pro rata* and *pro tanto* methods); *Terra-Drill*, 726 F. Supp. at 656-57 (comparing the three methods); *Atlantic Financial*, 718 F. Supp. at 1017-18 (comparing *pro tanto* and proportionate methods).

> reduction accomplishes this goal. A rule of *pro rata* reduction frustrates it to the extent that the plaintiff makes a good or a bad settlement.

Miller, 646 F.2d at 109.

Courts in the First, Second, Fifth, Seventh and Eighth Circuits have expressly rejected the *Kaypro* rule and adopted the *pro tanto* offset method because it is clearly superior. *See, e.g., Singer*, 878 F.2d at 600; *Biben*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,512, at 92,332-33; *FDIC v. Geldermann, Inc.*, 763 F. Supp. 524, 528-32 (W.D. Okla. 1990); *MFS Municipal Income Trust*, 751 F. Supp. at 281-86; *Dalton*, 741 F. Supp. at 159-60; *Terra-Drill*, 726 F. Supp. 656-57; *Atlantic Financial*, 718 F. Supp. at 1017-18; *see also* Davis, *Multiple Defendant Settlement*, 40 Hastings L.J. at 1272 (suggesting that a *pro tanto* rule "would produce more equitable settlements").

We have shown the *Kaypro* proportionate fault rule adds complexity to already complex securities fraud jury trials, requiring the jury to make subtle determinations regarding the fault of an absent non-party and compelling plaintiffs' counsel to defend a person or entity they believed defrauded them if the victims of the scheme are to maximize their recovery. Under the *pro tanto* rule, contribution does not inhibit settlement to the extent that it does under the *Kaypro* rule because the *pro tanto* offset allows plaintiffs to be made whole. Moreover, under the *pro tanto* rule the uncertainty inherent in the proportionate fault rule is not present because the non-settling defendant is entitled to a set-off equal to the dollar amount of the settlement with the settling defendants.

Of course, even the *pro tanto* rule has its deficiencies.[26] Although the *pro tanto* rule is clearly preferable to

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[26] It requires the trial court to make a finding that a partial settlement has been made in good faith and is appropriate under the circumstances. The fundamental concern at the good faith hearing is that the settlement is fair to the non-settling defendant because he, she, or it is giving up purportedly valuable contribution rights. Such a finding may require a court to review potential liability and damages at a time when such evidence may not be sufficiently developed through discovery. *See Jiffy Lube*, 927 F.2d at 159; *Kaypro*, 884 F.2d at 1230; *Biben*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,512, at 92,333; *Atlantic Financial*, 718 F. Supp. at 1017; *Patriot's Point*, 772 F. Supp. at 1574.

the *Kaypro* rule of proportionate fault because it does not inhibit settlement to such a crippling degree, and because it does not reduce deterrence as much, *neither rule* furthers the purposes of Section 10(b) and Rule 10b-5. A holding that rejects contribution altogether is far superior to *any* contribution rule.

III. CONCLUSION

Creation of a judicially implied cause of action for contribution under Section 10(b) and Rule 10b-5 is impermissible under this Court's decisions in *Northwest Airlines* and *Texas Industries*. Moreover, permitting contribution in this setting is contrary to the public policy of Section 10(b) because it reduces deterrence, discourages settlement and, in many Circuits, prevents victims of fraud from being made whole. In addition, it greatly increases the expense and burden of litigation both for litigants and courts.

When addressing public policy concerns raised by a claimed right to contribution under the antitrust laws, this Court stated:

> In declining to provide a right to contribution, we neither reject the validity of those arguments nor adopt the views of those opposing contribution. Rather, we recognize that, *regardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve.*

Texas Industries, 451 U.S. at 646 (emphasis added). Thus, this Court recognized:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.

Id. at 647 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)).

As this Court stated last Term, unlike the discretion to award appropriate relief, the authority to fashion a new cause of action for contribution expands the federal judicial power "into a sphere properly reserved to the Executive and Legislative Branches." *Franklin*, 112 S. Ct. at 1037; *see also Northwest Airlines*, 451 U.S. at 97; *Chutich*, 960 F.2d at 724. Thus, this Court should reverse the Ninth Circuit's decision recognizing an implied cause of action for contribution under Section 10(b) and Rule 10b-5.

DATED: November 19, 1992

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No. 92-31

In the Supreme Court of the United States

OCTOBER TERM, 1992

MUSICK, PEELER & GARRETT, ET AL., PETITIONERS

v.

EMPLOYERS INSURANCE OF WAUSAU, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether there is an implied right to contribution under Section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b-5.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-34

MUSICK, PEELER & GARRETT, ET AL., PETITIONERS

v.

EMPLOYERS INSURANCE OF WAUSAU, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission is responsible for the administration and enforcement of the federal securities laws. Private actions under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, constitute "an essential tool for enforcement of the 1934 Act's requirements." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988). This case presents the question whether a right of contribution is available in private actions under Section 10(b) and Rule 10b-5. Because the resolution of that issue will have an impact on Section 10(b) litigation, the Commission has an interest in the outcome of this case.

STATUTES AND RULE INVOLVED

Section 11(f) of the Securities Act of 1933, 15 U.S.C. 77k(f), and Sections 9(e), 10(b), and 18 of the Securities Exchange Act of 1934, 15 U.S.C. 78i(e), 78j(b), and 78r, and Rule 10b-5, 17 C.F.R. 240.10b-5, are set forth in relevant part in the appendix to this brief.

STATEMENT

1. In December 1983, Cousins Home Furnishing, Inc. made a public offering of its stock. Shareholders who purchased shares in the offering subsequently commenced a class action against Cousins, its holding company, certain of its officers and directors, and its two lead underwriters. The complaint alleged that the offering was misleading in violation of the federal securities laws, including Section 10(b) and Rule 10b-5.[1] The complaint did not name the attorneys and accountants who had performed professional services in connection with the offering. Pet. App. 3; J.A. 14-15.

The defendants settled the class action by agreeing to pay the shareholders $13.5 million. The district court approved the settlement pursuant to Rule 23, Fed. R. Civ. P., after a good faith hearing to determine the defendants' fair share of the damages alleged in the case. Pet. App. 3, 15-16. Respondents, the insurers of most of the settling defendants, funded $13 million of the settlement. J.A. 5-7, 16.

2. After the settlement was consummated, respondents commenced an action seeking contribution from petitioners, the attorneys and accountants involved in the public offering.[2] The complaint alleged that petitioners

[1] The complaint also alleged, *inter alia*, violations of Sections 11 and 12(2) of the Securities Act of 1933, 15 U.S.C. 77k and 77*l*(2), and pendent claims under California law. J.A. 15.

[2] Respondents are subrogated to the rights of the settling defendants. Pet. App. 4; J.A. 7.

had committed securities frauds that caused the injuries suffered by the shareholders in the class action, and were therefore liable for contribution under Section 10(b) and Rule 10b-5.[3] Pet. App. 3, 16-17; J.A. 30-33, 34-36.

Petitioners filed a motion to dismiss asserting that the district court in the class action had found that the settlement reflected the settling defendants' "fair share" of the total liability, and, therefore, respondents were not entitled to contribution. The district court agreed and dismissed the action. Pet. App. 4, 18-24.

3. The court of appeals reversed. Pet. App. 1-13. The court noted that, although "[n]o explicit right to contribution is provided for in section 10(b) * * * or Rule 10b-5," circuit precedent had concluded that "these provisions imply a right of contribution." Pet. App. 4.[4] In this case, the court of appeals found that the district court had erred in dismissing respondents' claim for contribution. The court explained that the finding that the settling defendants had paid their fair share of damages "relative to the other defendants involved in the [class] litigation" did not dispose of the question whether they had paid a fair share relative to other parties, such as petitioners, who were also potentially responsible for the class's damages. Pet. App. 8.

The court also concluded that policy considerations favored allowing contribution. Pet. App. 10-11. While acknowledging that contribution claims require additional litigation, the court noted that "[t]hese costs, however, were deemed acceptable in the context of securities law when Congress explicitly provided for contribution" un-

[3] The complaint also included a contribution claim against the accountants under Section 11 of the Securities Act of 1933, 15 U.S.C. 77k, J.A. 37-38, and contribution and indemnity claims under state law, J.A. 33, 36-37, 38-46.

[4] The court cited *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222, 1226 (9th Cir. 1989), cert. denied, 111 S. Ct. 232 (1990), and *Smith* v. *Mulvaney*, 827 F.2d 558, 561 (9th Cir. 1987).

der the express rights of action in Section 11(f) of the Securities Act, 15 U.S.C. 77k(f), and Sections 9(e) and 18(b) of the Exchange Act, 15 U.S.C. 78i(e), 78r(b). Pet. App. 11.

SUMMARY OF ARGUMENT

The implied right of action under Section 10(b) and Rule 10b-5 was not established by Congress, but this Court has consistently derived the legal rules governing that action from congressional policies reflected in the express terms of the Securities Exchange Act. In fashioning the express causes of action in that Act, Congress determined that the common law rule precluding contribution in fraud actions did not serve the policies of the securities laws, and accordingly created express rights of contribution. There is no reason to depart from that congressional policy determination in Section 10(b) actions.

A. Federal courts have the power to recognize contribution rights under Section 10(b). The Court has held that federal courts may not ordinarily imply contribution rights into an *express* federal statutory cause of action. In this case, however, the Court is faced with the task of implementing an *implied* cause of action that Congress did not intentionally create, but that has become an integral part of federal law. In that setting, the Court has recognized that the implied cause of action must be judicially defined and that the Court has power to "round[] out" the parties' rights to ensure even-handed application of the law. *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2764 (1991).

Those principles justify recognition of contribution under Section 10(b), because there is compelling evidence, in the comparable express causes of action, that Congress intended to permit contribution for similarly situated securities fraud defendants. For the courts to ignore that intention would be unfair to defendants who

are subject to suit under Section 10(b) only because courts have implied that right. The proper approach is to give effect to the overall legislative scheme. Recognition of contribution gathers additional support from the longstanding acceptance of that right in the lower federal courts.

B. Sections 9(e) and 18(b) of the Exchange Act expressly state that "[e]very person who becomes liable to make any payment under this [provision] may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment." 15 U.S.C. 78i(e), 78r(b). In changing the common law rule, Congress adopted a clear policy favoring contribution that also applies to Section 10(b). Sections 9 and 18, like Section 10(b), afford damages remedies for securities fraud; they are aimed at the same types of misconduct; and they support the same goals. In *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), the Court looked to those Sections to supply a statute of limitations for Section 10(b); Sections 9 and 18 are equally relevant to the issue of contribution. Because Sections 9, 10(b), and 18 compose a family of rights that should be construed to form a coherent whole, contribution under Section 10(b) should be modeled on those textually explicit Exchange Act provisions.

C. The Court need not balance policy considerations to recognize contribution rights under Section 10(b); Congress has already performed that task in fashioning the comparable express rights. If it is necessary to weigh the competing policies, however, the fairness concerns furthered by contribution support its recognition here. There is no evidence that contribution will detract from the deterrent effect of Section 10(b), unduly inhibit settlements, or create unmanageably complex litigation.

ARGUMENT

A RIGHT OF CONTRIBUTION SHOULD BE RECOGNIZED IN PRIVATE ACTIONS UNDER SECTION 10(b) AND RULE 10b-5

The implied right of action under Section 10(b) is a critical and well-established means of private enforcement of the federal securities laws. Although the existence of that right is unquestionable, *Basic Inc.* v. *Levinson*, 485 U.S. 224, 230-231 (1988); *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 380 (1983); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 196 (1976); *Blue Chip Stamps* v. *Manor Drug Stores, Inc.*, 421 U.S. 723, 730 (1975); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971), this Court has "made no pretense that it was Congress' design to provide the remedy afforded." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773, 2780 (1991). The Court, however, has not ignored evidence of congressional intent, drawn from the language and structure of the securities laws as a whole, in analyzing issues that arise in Section 10(b) litigation. Rather, the Court has often construed Section 10(b) to conform it to the structure and policies reflected in the overall legislative scheme.[5]

That principle is directly applicable in this case. In the original 1934 Exchange Act, Congress created express rights of contribution in Sections 9 and 18—the provisions most analogous to Section 10(b). 15 U.S.C. 78i(e), 78r(b); see also 15 U.S.C. 77k(f). In providing those contribution rights, Congress established a rule of shared liability for shared fault. That legislative choice should

[5] See *Lampf*, 111 S. Ct. at 2780-2781 (applying to Section 10(b) the statutes of limitation governing the express rights of action in the Exchange Act); *Blue Chip Stamps*, 421 U.S. at 733-736 (defining standing limitations under Section 10(b) in light of the express rights of action in the Exchange Act).

inform the interpretation of Section 10(b). There can be "no clearer indication of how Congress would have balanced the policy considerations" raised by contribution claims under Section 10(b) "than the balance struck by the same Congress in [defining] similar and related protections." *Lampf*, 111 S. Ct. at 2780.

A. Federal Courts Have Power To Imply A Right Of Contribution Under Section 10(b)

1. There is no express right to contribution provided in Section 10(b) of the Exchange Act, nor is the issue addressed in the legislative history of the Exchange Act. That is not surprising, given that the underlying right to sue under Section 10(b) is itself implied, and there is no "indication that Congress considered the problem of private suits under [Section 10(b)] at the time of its passage." *Blue Chip Stamps*, 421 U.S. at 729.[6] While the textually explicit rights in the Exchange Act reveal a clear policy in favor of contribution that is also applicable to Section 10(b), see pp. 15-21, *infra*, the threshold issue in this case is whether the federal courts have the power to defer to that policy.

In two prior cases, the Court has considered the reverse issue: whether courts may depart from congressional

[6] After the Commission adopted Rule 10b-5 in 1942, see SEC Securities Exchange Act Release No. 3230, the court in *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946), applied the principle that the violator of a provision is subject to suit by those especially protected by the provision, see *Texas & Pac. Ry.* v. *Rigsby*, 241 U.S. 33 (1916), and found an implied right to sue under Section 10(b) and Rule 10b-5. When this Court first considered the issue in *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, *supra*, the Court "explicitly acquiesced in the 25-year-old acceptance by the lower federal courts of a Rule 10b-5 cause of action" without specifically examining congressional intent on that issue. *Cannon* v. *University of Chicago*, 441 U.S. 677, 690-693 n.13 (1979). Congress has ratified the private Section 10(b) action, *Basic*, 485 U.S. at 231, and petitioners do not question the right of investors to sue under Section 10(b). Pet. Br. 16 n.7.

policy by implying a contribution remedy where the statute provides an express right to sue, but no right of contribution. *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981) (Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (Sherman and Clayton Acts). In each case, the Court concluded that, absent either a showing of congressional intent to create a contribution remedy, or a basis for exercising federal common law authority, the Court lacked power to recognize a right of contribution. *Northwest Airlines*, 451 U.S. at 91-99; *Texas Industries*, 451 U.S. at 638-647. In both cases, however, the Court reserved the quite different issue posed here—whether contribution should be implied, by borrowing that remedy from analogous provisions in the federal securities laws, for defendants sued under the implied Section 10(b) cause of action. *Northwest Airlines*, 451 U.S. at 91-92 n.24; *Texas Industries*, 451 U.S. at 640 n.11.

2. Petitioners and their amici contend that the issue in this case must be resolved under the analysis utilized in *Northwest Airlines* and *Texas Industries* and that the Court should conclude, as it did in those cases, that neither congressional intent nor federal common law justify recognition of an implied contribution right. Pet. Br. 9-11; NASCAT Br. 4-11. For several reasons, petitioners' contention is unsound.

a. The question whether the Court may imply a right of contribution under Section 10(b) raises distinct issues from the question whether the Court may add a contribution remedy to an express scheme of rights that conspicuously omits such a remedy. Although "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers," *Northwest Airlines*, 451 U.S. at 95, this Court has not abstained from the task of construing and developing the existing implied rights of action under

the securities laws. Rather, the Court shaped those implied rights in order to harmonize them with the express congressional scheme and to promote their consistent and fair administration. That power to "round[] out" the substance of an existing implied right applies in this case. *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2764 (1991).

The Court's decision in *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, illustrates that point. In that case, the issue was whether nonpurchasers or nonsellers of securities had standing to sue under Rule 10b-5. 421 U.S. at 725. The text of the statute did not address that issue, but the Court acknowledged that "[w]e are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question." *Id.* at 749. The Court resolved the issue by noting the trend in judicial decisions,[7] by comparing Section 10(b) to the structure of the express rights of action,[8] and by reviewing policy considerations.[9] *Id.* at 733-749.

More recently, the Court recognized its power to extend an implied right in order to maintain evenhanded administration of the securities laws. In *Virginia Bank-*

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[7] The Court observed that "virtually all of the lower federal courts facing the issue" had limited the plaintiff class to purchasers or sellers. 421 U.S. at 731. The Court gave weight to that "longstanding" view of the courts. *Id.* at 733.

[8] The Court noted that the express private rights to sue under Sections 11 and 12 of the Securities Act, 15 U.S.C. 77k, 77*l*, and Sections 9 and 18 of the Exchange Act, 15 U.S.C. 78i, 78r, are limited to purchasers or sellers of securities. "It would indeed be anomalous," the Court concluded, "to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." 421 U.S. at 736.

[9] The Court concluded that those considerations favored limiting standing to purchasers or sellers of securities. 421 U.S. at 749.

shares, Inc. v. *Sandberg, supra*, the Court was asked to expand the implied private right to sue for proxy fraud under Section 14(a) of the Exchange Act, 15 U.S.C. 78n(a). See *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). The Court held that a claim to expand the *Borak* right is not necessarily foreclosed by "congressional silence" on the issue of private enforcement of Section 14(a). 111 S. Ct. at 2764. Citing *Blue Chip Stamps*, the Court stated that "where a legal structure of private statutory rights has developed without clear indications of congressional intent, the contours of that structure need not be frozen absolutely when the result would be demonstrably inequitable to a class of would-be plaintiffs with claims comparable to those previously recognized." 111 S. Ct. at 2764.[10]

In *Northwest Airlines* and *Texas Industries*, Congress had created the very causes of action at issue, and there was no justification for the courts to add to the scope of those rights absent a clear showing of specific congressional intent, or an independent source of common law power. As this Court recognized in *Blue Chip Stamps*, 421 U.S. at 749, however, the unique history of Section 10(b) requires a different analysis. The implied right under Section 10(b) was established before this Court made clear that the "most important inquiry" in the implication of a right is "whether Congress intended to create the private remedy." *Suter* v. *Artist M.*, 112 S. Ct. 1360, 1370 (1992); *Thompson* v. *Thompson*, 484 U.S. 174, 189-190 (1988) (Scalia, J., concurring); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575 (1979).

[10] Petitioners assert (Br. 18) that *Virginia Bankshares* held that "any attempt to extend [the] scope [of a previously recognized implied right] will be subjected to rigorous analysis under the correct standard," namely, an inquiry in congressional intent. The Court did not so hold, however; it stated that while "congressional silence * * * is * * * a serious obstacle to the expansion" of an implied right, it is not "a necessarily insurmountable barrier." *Virginia Bankshares*, 111 S. Ct. at 2764.

Having created the Section 10(b) cause of action, it would be anomalous to conclude that the courts have no power to develop it in conformity with the overall congressional scheme. It would be "demonstrably inequitable," *Virginia Bankshares*, 111 S. Ct. at 2764, to deny contribution to defendants in Section 10(b) actions in light of the congressional determination to permit defendants in express securities fraud actions to reduce their liability through contribution.

Petitioners contend (Br. 23) that while the courts must engage in some lawmaking when filling out the rights of plaintiffs under Section 10(b), the courts cannot create "a new cause of action" on behalf of Section 10(b) defendants. Defendants, as well as plaintiffs, however, are entitled to have Section 10(b) applied fairly to them.[11] Contribution claims under Section 10(b) arise only because the courts have determined that liability under the provision is joint and several, see *Globus* v. *Law Research Service, Inc.*, 442 F.2d 1346 (2d Cir.) (per curiam), cert. denied, 404 U.S. 941 (1971), and that rule is itself adopted from the express rights in the securities laws. See 15 U.S.C. 77k(f). It is not a large step to borrow the corresponding express rights of contribution.

Moreover, while contribution claims have been treated as a "right of action," *Texas Industries*, 451 U.S. at 639, the contribution remedy under Section 10(b) is not entirely distinct from the existing implied right, but is closely tied to it. The plaintiff in a contribution case will have been a defendant in the investor's original Section 10(b) suit, and the defendant in a contribution case will always be a person who either was sued, or could have been sued, in the original action. Contribu-

[11] To hold that, because Section 10(b) is an implied action, it cannot be developed in ways that promote fairness for both parties would be "highly unjust to those who must litigate past inventions." *Lampf*, 111 S. Ct. at 2783 (Scalia, J., concurring).

tion issues commonly arise as cross-claims in the original Section 10(b) action. In short, contribution is derivative of the original implied claim, serving to finish what the Section 10(b) litigation began. Courts are not powerless to complete the implied Section 10(b) action by apportioning liability among defendants—as the comparable express actions provide.

b. Although the text and history of Section 10(b) provide no guidance on the issue of contribution, that is not to say that there is no evidence of congressional intent. Congress consistently provided a right of contribution in the analogous express rights in the Exchange Act, and that legislative pattern should inform resolution of the parallel issue under Section 10(b). As this Court has recognized, evidence of intent from the "overall legislative scheme," *Texas Industries*, 451 U.S. at 639, and "statutory structure," *Northwest Airlines*, 451 U.S. at 94, is highly relevant in determining whether courts should recognize a contribution remedy.

In the implied-rights context, the need to consider statutory structure to discern legislative intent is particularly strong, for other sources will ordinarily provide no assistance. See *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. 1028, 1035 (1992) ("Because the [Title IX] cause of action was inferred by the Court in *Cannon* [v. *University of Chicago*, 441 U.S. 677 (1979)], the usual recourse to statutory text and legislative history in the period prior to that decision necessarily will not enlighten our analysis."). For precisely that reason, the Court has in the past consulted the comparable express rights in delineating the boundaries of Section 10(b). *Lampf*, 111 S. Ct. at 2780 (statute of limitations); *Blue Chip Stamps*, 421 U.S. at 729 (standing); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 206 (scienter requirement); *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 314 (1985) (*in pari delicto* defense).

If the courts were powerless to recognize contribution under Section 10(b), it would produce precisely the harm that this Court's modern implied-right-of-action jurisprudence seeks to prevent: encroachment on the legislative role through judicial policymaking. The Court has concluded that there is rarely justification to supplement express remedial schemes with judicially created rights, not only because of the potential for interfering with the legislative plan, but also because the creation of the right to sue involves policy choices that are better made by a legislature than a court. *Northwest Airlines*, 451 U.S. at 97; *Texas Industries*, 451 U.S. at 646-647; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979); *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985).

In this case, however, those values point in the opposite direction. The disallowance of contribution under Section 10(b) would place defendants sued under the implied right in a worse position than those sued under the express rights. Section 10(b) defendants would be denied the benefit of Congress' concern that comparably situated defendants under the securities laws not be saddled with disproportionate damages liability—not because Congress intended that result, but because their liability rests on a right of action the courts created. Modelling the right of contribution under Section 10(b) on the analogous express rights avoids that incongruous result.[12]

c. Finally, contribution under Section 10(b) has long been the status quo in the lower courts. Since a right of

[12] Contribution under the Exchange Act differs from the provision that a plaintiff may be required to post a bond to secure costs, which is found in some, but not all, of the express rights. Compare 15 U.S.C. 77*l*(2) and 78i(e) with 15 U.S.C. 78p and 78cc. Because there is no apparent rationale for including that provision in some (but not other) sections, courts have refused to import the bond requirement into Section 10(b) litigation. See *McClure* v. *Borne Chem. Co.*, 292 F.2d 824, 837 (3d Cir.), cert. denied, 368 U.S. 939 (1961).

contribution was first recognized in *deHaas* v. *Empire Petroleum Co.*, 286 F. Supp. 809, 815-816 (D. Colo. 1968), aff'd in part, vacated in part, on other grounds, 435 F.2d 1223 (10th Cir. 1970), contribution has been widely approved in Section 10(b) litigation.[13] The "long-standing acceptance" of contribution under Section 10(b) is entitled to weight in resolving this issue. *Blue Chip Stamps*, 421 U.S. at 733; see also *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353 (1982).

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[13] The court in *deHaas* accepted Professor Loss's suggestion that "might not a court * * * permit contribution [under Section 10(b)] in view of the fact that contribution clauses are found in § 11 of the 1933 act and §§ 9(e) and 18 of the 1934 act * * *, the *specific* liability provisions which contemplate multiple defendants?" 3 L. Loss, *Securities Regulation* 1739-1740 n.178 (2d ed. 1961). Since then, four courts of appeals have allowed contribution. See *Smith* v. *Mulvaney*, 827 F.2d 558, 561 (9th Cir. 1987); *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 558 & n.44 (5th Cir. 1981), aff'd in part and rev'd in part on other grounds, 459 U.S. 375 (1983); *Heizer Corp.* v. *Ross*, 601 F.2d 330, 332 (7th Cir. 1979); *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970), aff'd per curiam, 442 F.2d 1346 (2d Cir. 1971), cert. denied, 404 U.S. 941 (1971). Numerous district courts have followed the same approach. See, *e.g.*, *Baker* v. *BP America, Inc.*, 749 F. Supp. 840, 842-844 (N.D. Ohio 1990); *Marrero* v. *Abraham*, 473 F. Supp. 1271, 1277 (E.D. La. 1979); *McLean* v. *Alexander*, 449 F. Supp. 1251, 1266-1267 (D. Del. 1978), rev'd on other grounds, 599 F.2d 1190 (3d Cir. 1979); *Odette* v. *Shearson, Hammill & Co.*, 394 F. Supp. 946, 957-958 (S.D.N.Y. 1975); *Liggett & Myers, Inc.* v. *Bloomfield*, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974); *Alexander & Baldwin, Inc.* v. *Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238 (S.D.N.Y. 1974); *Getter* v. *R.G. Dickinson & Co.*, 366 F. Supp. 559, 569 (S.D. Iowa 1973). Among the courts of appeals, the Eighth Circuit stands alone in rejecting contribution under Section 10(b). *Chutich* v. *Touche Ross & Co.*, 960 F.2d 721 (1992). That court, however, did not examine the structure of express rights or congressional intent; it simply rejected the argument that federal common law, as described in *Northwest Airlines* and *Texas Industries*, justifies implication of contribution rights. 960 F.2d at 723-724.

B. The Securities Exchange Act Manifests A Clear Congressional Intent To Permit Contribution

The remedial structure of the Exchange Act demonstrates that Congress favored contribution rights for violators held jointly and severally liable for damages from securities fraud. While the common law denied contribution to intentional tortfeasers, see *Merryweather* v. *Nixan*, 101 Eng. Rep. 1337 (K.B. 1799), the Exchange Act changed that rule under the express rights to which Section 10(b) is comparable. That scheme should be respected under Section 10(b) as well.

1. Congress enacted the Exchange Act in part to remedy perceived deficiencies in the common law. *Herman & MacLean* v. *Huddleston*, 459 U.S. at 389. The Act provides for comprehensive regulation of securities trading and establishes an ongoing reporting system for public companies. *E.g.*, 15 U.S.C. 78i, 78k, 78*l*, 78m. In addition, Congress provided express remedies for investors injured by manipulative practices or false or misleading reports. Section 9(e) creates a right of action in favor of investors affected by manipulation against any person who willfully participates in proscribed acts. 15 U.S.C. 78i(e). Section 18(a) creates a right of action in favor of investors affected by false or misleading statements, made in bad faith, in filings with the Commission. 15 U.S.C. 78r(a). With respect to each of those actions, Congress specifically provided contribution rights:

> Every person who becomes liable to make any payment under this [provision] may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

15 U.S.C. 78i(e), 78r(b).[14]

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[14] Section 11(f) of the Securities Act of 1933, 15 U.S.C. 77k(f), also provides a right of contribution for violations of the prospectus provision of that Act "unless the person who has become liable was,

The Exchange Act's contribution language was modelled on the British Companies Act, which had altered the common law of torts by permitting all violators of its provisions to recover contribution "as in contract." See Douglas & Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 178 & n.29 (1933), citing 19 & 20 Geo. V., ch. 23, § 37(g) (1929); see also *Gerson* v. *Simpson*, 89 L.T.R. 117 (A.D. 1903). The reference "as in contract" reflected the fact that, at common law, contribution was permitted among those jointly liable on a debt. 2 W. Jaeger *Williston on Contracts* § 345, at 762-765 (3d ed. 1959).

As this Court recently explained, the rights of action under Sections 9 and 18 are directly analogous to Section 10(b) cause of action. *Lampf*, 111 S. Ct. at 2781. Section 10(b) is a "catchall" provision designed to target manipulative or deceptive practices in connection with the purchase or sale of any security in violation of rules promulgated by the Commission. 15 U.S.C. 78j(b); see *Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 203.

> Section 9 of the 1934 Act, 15 U.S.C. § 78i, pertaining to the willful manipulation of security prices and § 18, 15 U.S.C. § 78r, relating to misleading filings, target the precise dangers that are the focus of § 10(b). Each is an integral element of a complex web of regulations. Each was intended to facilitate a central goal: "to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting

and the other was not, guilty of fraudulent misrepresentation." That language indicates that Congress intended to permit contribution even for intentional violators of the Act against similarly situated defendants. The qualifying language found in Section 11(f) was not imported into the Exchange Act, because Sections 9 and 18 do not prohibit mere negligence. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 209 n.28.

> requirements on companies whose stock is listed on national securities exchanges."

Lampf, 111 S. Ct. at 2781, quoting *Ernst & Ernst*, 425 U.S. at 195. In *Lampf*, the Court relied on those similarities in holding that the statute of limitations provided in Sections 9 and 18 should govern private actions under Section 10(b). 111 S. Ct. at 2781. The reasoning in *Lampf* applies to contribution as well.[15]

In an important respect, the relatively short statutes of limitations provided in Sections 9 and 18 and the rights of contribution in those provisions serve similar purposes: both put boundaries on a defendant's exposure to liability under the rights of action that Congress created. The policy of concern for defendants' interests reflected in the securities laws, see Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. Pa. L. Rev. 597, 646 (1972), is evident not only in the limitations and contribution provisions, but also in the restriction on recoveries under the Act to actual damages, 15 U.S.C. 78bb(a). That policy of concern for the interests of defendants has the same relevance to Section 10(b) litigation as it has to the express rights. Accordingly, as many courts have held, see note 13, *supra*, the express recognition of contribution claims under Sections 9 and 18 should also govern the implied right under Section 10(b).

2. Citing other securities rights of actions that do not explicitly authorize contribution, petitioners contend (Br. 24-28) that the federal securities laws as a whole do not

[15] Both Sections 9 and 18 provide limitations periods that require an investor to sue within one year of discovery but not more than three years from the violation. 15 U.S.C. 78i(e), 78r(a). In *Lampf*, the Court noted that the language of those provisions differs somewhat, and it selected the statute of limitations contained in Sections 9 to be used in Section 10(b) actions. *Lampf*, 111 S. Ct. at 2782 n.9. Here, the language of the contribution provisions in Sections 9 and 18 is substantively identical.

reveal a congressional intent to allow contribution under Section 10(b). Petitioners are mistaken.

Section 16(b) of the Exchange Act, 15 U.S.C. 78p(b), provides a right of action to a corporation or its shareholders to recover short-swing profits realized when a corporate insider trades in the company's stock. *Gollust* v. *Mendell*, 111 S. Ct. 2173, 2175-2176 (1991). It contemplates that ordinarily there will be a single defendant who will be liable for his own profits, and unlike Sections 9 and 18, it does not provide for joint and several liability. See *Blau* v. *Lamb*, 163 F. Supp. 528, 531 (S.D.N.Y. 1958) (Section 16(b) plaintiff must prove that each defendant realized profits). Contribution is, therefore, ordinarily irrelevant to Section 16(b) claims; the absence of a contribution right under that provision is therefore not surprising. Just as in *Lampf*, 111 S. Ct. at 2780 n.5, where the Court noted that Section 16(b) "differs in focus from § 10(b) and from the other express causes of action," here, the distinctive characteristics of the Section 16(b) disgorgement remedy explain the absence of contribution.[16]

Section 20(a), 15 U.S.C. 78t(a), expands the categories of persons who may be sued under other provisions. It imposes joint and several liability in certain circumstances on "every person who controls any person liable" under the Exchange Act "*with and to the same extent as such controlled person * * * is liable.*" 15 U.S.C. 78t(a) (emphasis added). That provision is not substantive; it merely incorporates the liability created in other sections

[16] Petitioners state (Br. 27) that under Section 20(a), 15 U.S.C. 78t(a), a control person of a Section 16(b) insider could be held jointly and severally liable for the insider's short-swing profits. While that is theoretically correct, it is of no significance here. The remote possibility that a control person might be held liable for disproportionate damages under Section 16(b) does not take away from the fact that the usual defendant under Section 16(b) would be required simply to disgorge *his* profits, and that fact explains the absence of contribution rights.

of the Securities Exchange Act. Accordingly, although Section 20(a) does not contain its own contribution provision, it incorporates contribution rights provided in the substantive rules. See *Laventhol, Krekstein, Horwath & Horwath* v. *Horwitch*, 637 F.2d 672, 675 (9th Cir. 1980) (holding that counterpart control-person provision of the Securities Act of 1933, 15 U.S.C. 77o, incorporates the contribution rights of the underlying substantive provision alleged to have been violated), cert. denied, 452 U.S. 963 (1981).[17]

Finally, the recently enacted Section 20A of the Exchange Act is not relevant here.[18] It permits certain investors to hold insider traders and their tippers jointly and severally liable for profits gained or loss avoided in the unlawful transaction. 15 U.S.C. 78t-1(a), (b)(1), (c). That provision is more like the disgorgement remedy in Section 16(b) than the damages remedies for fraud available under Sections 9, 18, and 10(b). It does not pose the same threat of disproportionate liability as do the damages remedies, as each defendant is essentially liable only for his own gain.[19] In *Lampf*, this Court noted

[17] A few district courts and one article have incorrectly suggested that Section 20(a) does not afford contribution rights. See, *e.g.*, *In re Olympia Brewing Co. Sec. Litigation*, 674 F. Supp. 597, 615 & n.18 (N.D. Ill. 1987); Loewenstein, *Implied Contribution Under the Federal Securities Laws: A Reassessment*, 1982 Duke L.J. 543, 551. That analysis, however, overlooks Section 20(a)'s language, which states that the controlling person's liability exists only "to the same extent as [the] controlled person."

[18] Section 20A, 15 U.S.C. 78t-1, was enacted as part of the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 5, 102 Stat. 4680. The provision states that "[n]othing in this section shall be construed to limit * * * the availability of any cause of action implied from a provision of this chapter." 15 U.S.C. 78t-1(d).

[19] Liability under Section 20A is limited to the profits made or loss avoided through insider trading, see 15 U.S.C. 78t-1(b)(1). The tippee is liable because he directly profits; the tipper is liable

the special characteristics of Section 20A in rejecting it as a source for the statute of limitations governing Section 10(b) claims. 111 S. Ct. at 2781. The same conclusion applies in the contribution context.[20]

In sum, the Securities Exchange Act reflects a clear congressional purpose to allow persons who commit intentional securities frauds of the sort addressed in Section 10(b) to seek contribution from their fellow wrongdoers. This Court has cited the Exchange Act's express contribution provisions as evidence that "it is particularly important to permit litigation among guilty parties [that will serve] to expose their unlawful conduct and render them more easily subject to appropriate civil, administrative and criminal penalties." *Bateman Eichler*, 472 U.S. at 315-316 & n.28.[21] In view of the significance that

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because he benefits by giving the tippee that opportunity, see *Dirks* v. *SEC*, 463 U.S. 646, 664 (1983) ("The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient."). Moreover, if the defendant has previously disgorged his illegal trading profits in a Commission action, that disgorgement offsets his liability in the private action, 15 U.S.C. 78t-1(b)(2), and he may have to pay nothing to the private plaintiff.

[20] Some courts have drawn additional support for contribution under Section 10(b) from the fact that the Securities Act of 1933 provides for contribution in actions based on a false or misleading prospectus, 15 U.S.C. 77k(f). Petitioners note (Br. 26) that the other 1933 Act rights do not expressly authorize contribution, but the inferences petitioners draw from that observation are incorrect. Section 15, 15 U.S.C. 77o, is a control person provision comparable to Section 20(a) of the Exchange Act, and, as discussed above, it incorporates the liability conditions, and contribution rights, of the substantive provision violated. *Laventhol*, 637 F.2d at 675. Section 12, 15 U.S.C. 77*l*, provides a rescission remedy against securities sellers, which was not the type of remedy under which contribution traditionally was either relevant or available. See Loewenstein, *supra*, 1982 Duke L.J. at 551, citing 3 L. Loss, *Securities Regulation* 1739 n.178 (2d ed. 1961).

[21] In *Bateman Eichler*, the Court held that the defense of *in pari delicto* is not available to a broker-dealer sued for fraud by a customer under Section 10(b). The Court noted that, as Congress had expressly allowed the broker to sue fellow manipulators for contribution under Section 9(e), 15 U.S.C. 78i(e), Congress would not have intended the customer's wrongdoing to bar his suit against the broker. 472 U.S. at 316 n.28.

[22] In this case, for example, the shareholder plaintiffs sued the defendants under both Section 10(b) and Section 11 of the Securities Act of 1933, 15 U.S.C. 77k. See note 1, *supra*. Respondents,

Congress attached to contribution rights when creating express Exchange Act liability, contribution should be recognized under Section 10(b).

C. Policy Considerations Support Recognition of Contribution

1. The issue of contribution raises complicated policy choices and entails the balancing of competing values. Without the benefit of congressional guidance, this Court has declined to strike that balance on its own in interpreting the scope of express rights in federal statutory schemes. *Texas Industries*, 451 U.S. at 646-647; *Northwest Airlines*, 451 U.S. at 98. Here, however, Congress itself has balanced the competing policies raised by federal securities litigation seeking damages for fraud, and it determined to change the common law and allow contribution. Mirroring that statutory balance in litigation under Section 10(b) does not launch the federal courts into policymaking; it respects the express legislative scheme.

For the same reason, recognizing contribution under Section 10(b) does not inject a foreign element into securities litigation. With or without Section 10(b), contribution is, by congressional choice, an integral part of the federal securities laws. Where, as here, the plaintiff sues not only under Section 10(b) but also under the express securities rights that carry a contribution remedy, the courts and parties must take contribution into account.[22] See *Herman & MacLean* v. *Huddleston*, 459

U.S. at 387 (rights under Section 10(b) are cumulative of express Securities Act remedies). Petitioners and amicus NASCAT challenge the wisdom of allowing contribution, Pet. Br. 37-41; NASCAT Br. 15-29, but this Court need not enter into that debate. The 73d Congress, which was "best able to evaluate these policy considerations," *Northwest Airlines*, 451 U.S. at 98 n.41, has already indicated, in the text of Sections 9 and 18, how it wanted those issues resolved.

2. To the extent that the Court weighs policy considerations, cf. *Blue Chip Stamps*, 421 U.S. at 736, those considerations support contribution rights under Section 10(b). Contribution promotes the fair administration of the securities laws; it does not detract from the deterrent effect of Section 10(b); and it does not unduly hinder settlements or render Section 10(b) actions unmanageable.

a. The essential premise of contribution is that a "more equal distribution of justice" results when one wrongdoer is not "force[d] * * * to bear the entire loss, though the other may have been equally or more to blame." *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974). That concern for fairness applies with the same force to Section 10(b). Plaintiffs may elect to limit the wrongdoers sued, or may simply choose to execute a judgment against one of several defendants. Contribution tempers the possible arbitrariness that results from those actions. See *Heizer Corp.* v. *Ross*, 601 F.2d 330, 333 (7th Cir. 1979); Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 Iowa L. Rev. 533, 541-542 (1981).

The potential for unfairness is particularly acute under Section 10(b), because liability extends to primary as well as secondary violators acting in a variety of

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in turn, sought contribution from the accountant petitioners under Section 10(b) as well as the express contribution right in Section 11(f), 15 U.S.C. 77k(f). See note 3, *supra*.

different capacities. In multiple-defendant cases, participation and degrees of wrongdoing can vary widely. Ruder, *supra*, 120 U. Pa. L. Rev. at 599-600. The policy of the securities laws is to tailor the magnitude of liability to the level of fault. See, *e.g.*, 15 U.S.C. 78t(a) (specifying requirements for controlling-person liability); *Bateman Eichler*, *supra* (defining limits of *in pari delicto* defense); *Pinter* v. *Dahl*, 486 U.S. 622, 632-641 (1988) (same). Contribution accords with that policy.

b. Although deterrence is an important consideration under Section 10(b), in the 24 years since courts first recognized a right to contribution under that provision, see note 13, *supra*, the Commission has not found that the remedy has reduced the deterrent effect of the law. Nor has anyone suggested that the deterrent effect of the federal securities laws has been diluted by the express contribution provisions of the Securities Act and the Exchange Act. Whatever may be true under other laws, it does not appear that deterrence is undermined by allowing contribution under Section 10(b).

An economic analysis undertaken to determine the effects of allowing contribution among antitrust violators concluded that a no-contribution rule and a contribution rule yield the same deterrent effect. See Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. Law & Econ. 331, 349 (1980). The authors of the study suggest that if a violator is "risk averse," that is, if he would prefer a greater chance of a small loss to a smaller chance of a greater loss, a no-contribution rule would be a greater deterrent. *Id.* at 351. As this Court has noted, however, economists disagree on whether business decisionmakers are risk averse. *Texas Industries*, 451 U.S. at 636 n.8. It is quite possible that someone who is willing to violate the securities laws, and risk criminal liability

as well as large civil penalties, may be less risk averse than the average citizen.[23]

c. Finally, the concerns raised by petitioners and NASCAT that contribution will discourage settlement or complicate litigation do not justify depriving defendants of an equitable allocation of liability. Pet. Br. 38-40; NASCAT Amicus Br. 18-24.

The impact of contribution on settlements is difficult to determine. On the one hand, contribution can facilitate settlement by offering defendants the inducement of sharing their liability with other wrongdoers who were not sued in the original action. On the other hand, "a right to contribution may have a serious [adverse] impact on the incentive of defendants to settle," *Texas Industries*, 451 U.S. at 637, if the settling defendant is not protected from subsequent contribution claims. Moreover, the uncertainty occasioned by the effect of settlement under some contribution rules can inhibit plaintiffs from settling.[24]

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[23] The compatibility of contribution with Section 10(b) does not suggest that indemnification is consistent with the securities laws. Indemnification allows a violator to shift his entire responsibility for securities violations to someone else, thus significantly weakening the deterrent effect of the securities laws. There is no express authorization of indemnity in the federal securities laws, and the courts have correctly refused to imply a right to indemnification. See, *e.g.*, *King* v. *Gibbs*, 876 F.2d 1275, 1279-1283 (7th Cir. 1989); *Baker, Watts & Co.* v. *Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989) (en banc) (construing 15 U.S.C. 77*l*(2)); *Heizer*, 601 F.2d at 334.

[24] The principal competing rules are represented by the Ninth Circuit's decision in *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (1989), cert. denied, 111 S.Ct. 232 (1990), and the Second Circuit's decisions in *Singer* v. *Olympia Brewing Co.*, 878 F.2d 596 (1989), cert. denied, 493 U.S. 1024 (1990), and *In re Masters, Mates & Pilots Pension Plan*, 957 F.2d 1020, 1029-1032 (1992) (ERISA contribution). In the Ninth Circuit, a Court may issue a "contribution bar" (protecting a defendant who has settled a multiparty action against contribution claims by nonsettling defendants), subject to

The manner in which contribution rights are defined raises complex issues, see NASCAT Amicus Br. 18-19, but there is no reason to believe that the courts cannot fashion fair and workable standards that would adequately protect both plaintiffs and defendants. Indeed, the courts of appeals must in any event develop such rules to implement the express contribution rights in the securities laws. See *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) (involving contribution under Section 10(b) of the Exchange Act and Section 11 of the Securities Act of 1933), cert. denied, 111 S.Ct. 232 (1990). The contribution rules developed under the express rights should also apply to Section 10(b).

Nor does contribution under Section 10(b) add an unmanageable new dimension to securities litigation. Contribution, of course, will remain available under the express remedies in 15 U.S.C. 77k, 78i(e), and 78r(b). Although contribution actions can multiply or protract Section 10(b) proceedings, the universe of potential contribution plaintiffs is limited to those who are already defendants and who can credibly claim to have paid more than their proportionate share of the original plaintiff's damages. The universe of potential defendants is limited to those who could have been sued in the original action. There are numerous procedural tools available for dealing with cross-claims and third-party practice under the Federal Rules of Civil Procedure, and courts have a body of experience in managing complex litigation. Concerns

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the jury's allocation of fault between the settling and nonsettling defendants at the nonsettling defendants' trial. The nonsettling defendants then are liable only for their proportionate share of the plaintiff's total damages determined at trial. In the Second Circuit, the trial judge must conduct a hearing at the time of the settlement to determine whether the settlement is fair to the nonsettling defendants. If the settlement is approved, the settlement amount is offset against the plaintiff's recovery at trial against the nonsettling defendants. We take no position on what approach should be followed, and the Court need not address that issue in this case.

that those tools are inadequate in the area of securities law should not be permitted to override the fairness concerns served by contribution. Accordingly, the Exchange Act's rule allowing contribution for securities fraud defendants should be applied to Section 10(b).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Section 11(f) of the Securities Act of 1933, 15 U.S.C. 77k(f), provides:

> All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

Section 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78i(e), provides in pertinent part:

> Any person who willfully participates in any act or transaction in violation of subsection (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction[.] * * *
>
> Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a

national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 18 of the Securities Exchange Act of 1934, 15 U.S.C. 78r, provides in pertinent part:

(a) Any person who shall make or cause to be made any statement in any application, report, or document filed [with the Commission] * * * which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. * * *

(b) Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

Rule 10b-5, 17 C.F.R. 240.10b-5, provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

in connection with the purchase or sale of any security.

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Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO. ED BACANI and ROBERT TORKAR,

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY ASSOCIATION IN SUPPORT OF RESPONDENTS

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I. INTERESTS OF *AMICUS CURIAE.*

The Securities Industry Association ("SIA") is a not-for-profit corporation formed under the laws of Delaware. It is the largest trade association of the securities industry, with over 650 broker-dealer and investment banking firm members in the United States and Canada. SIA's members are frequently named as defendants in federal securities fraud actions. In certain cases, those members seek to pursue claims for contribution against co-defendants or against persons not named as defendants by plaintiffs. In other cases, SIA's members are the targets of contribution claims by others. Accordingly, SIA has a substantial interest in the laws governing the rights of contribution among those potentially liable for violating the federal securities laws, and has sought and obtained the consent of all parties to file this *amicus curiae* brief on the merits.

II. INTRODUCTION AND SUMMARY OF ARGUMENT.

Sound policy considerations support the recognition, by this Court, of rights to contribution among those potentially liable for violations of Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78(j)(b), and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission ("SEC"), 17 C.F.R. § 240.10b-5. Absent such rights – first recognized by the federal courts over twenty years ago and now well-established in almost every circuit – securities fraud plaintiffs and their counsel would have the unfettered discretion to select which actors, among all of those potentially liable under Rule 10b-5, are called to account for their conduct. Leaving that choice entirely to plaintiffs

would lead to grossly unfair results, as relatively minor participants in an alleged fraud could be forced to bear the entire burden of defending against the charge, and the entire risk of an adverse judgment, while significantly more culpable participants remained untouched. Moreover, knowing that plaintiffs alone had the right to determine the scope of a Rule 10b-5 case, potential targets could be tempted to collude with them, at the expense of others at risk, to avoid being pursued themselves.

The attempts of petitioners and the *amicus curiae* supporting them to characterize contribution claimants as "wrongdoers," and their request that contribution rights be denied to those "guilty" of a scienter-based violation, should not distract this Court from the fairness considerations militating in favor of contribution. The availability of contribution under federal law does not depend upon whether the conduct at issue is characterized as "intentional" or "negligent." Indeed, the federal securities statutes explicitly authorize contribution claims by those "guilty of fraudulent misrepresentation" and those who "willfully" violate the law. Moreover, as this Court and others have recognized, once a class is certified in a Rule 10b-5 action, powerful pressures often force defendants to abandon meritorious defenses and settle even weak claims. To characterize such defendants as "intentional tortfeasors," and deny them contribution rights on that ground, would be to ignore the economic realities that drive large-scale securities fraud litigation.

Nor should this Court be swayed by petitioners' counterintuitive argument that contribution rights – which of course increase the likelihood that every culpable actor will be held to answer for participating in securities fraud – somehow lessen the deterrence effect of

Rule 10b-5. The authorities upon which petitioners and their supporters rely for this point are both inconclusive and inapposite, as they depend on assumptions that are drawn largely from antitrust law and do not hold true for securities litigation.

Similarly, petitioners' suggestion that contribution rights make settlement of Rule 10b-5 actions "unjustifiably difficult" is belied by history. Not only has there been no appreciably deleterious effect upon the pace of Rule 10b-5 settlements since such rights were first recognized by the federal courts over twenty years ago; securities fraud cases are now more likely to settle out of court than other civil actions. Even if the denial of contribution rights in Rule 10b-5 cases would increase plaintiffs' ability to extract pretrial settlements from their chosen targets, such a result, standing alone, would not justify an unfair rule of law.

As for petitioners' complaint that the lower federal courts have adopted inconsistent contribution standards and bar rules – leading to "confusion" in those courts – this hardly furnishes a legitimate reason for this Court to turn its back on the entire doctrine of contribution. On the contrary: it is the function of this Court to resolve such conflicts, and thereby bring consistency and predictability to the field. After considering the two leading approaches embraced by the lower federal courts, SIA recommends the proportionate fault rule announced in *Smith v. Mulvaney*, 827 F.2d 558 (9th Cir. 1987), and applied to partial pretrial settlements in *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 232 (1990).

It is the proportionate fault rule – which ensures that all defendants taken to trial pay their fair share of the

total damages to plaintiffs, whether or not other defendants have previously settled out – that is most consistent with the basic fairness notions underlying the doctrine of contribution itself. In contrast, the *pro tanto* rule adopted by the Second Circuit – which renders nonsettling defendants arbitrarily liable for whatever portion of plaintiffs' damages have not already been paid in settlement – undermines the equities that contribution is supposed to ensure and improperly penalizes nonsettling defendants for exercising their right to trial.

The proportionate fault rule is fair to plaintiffs as well. Contrary to the claims of its critics, *Kaypro* does not deprive plaintiffs of any "right to be made whole." In fact, under *Kaypro*, a plaintiff entering into a partial settlement may, after trial, recover more than 100% of the total damages assessed by the jury. Moreover, the possibility – or even probability – of a different outcome is no reason to reject the rule. The settlement process properly entails compromises by plaintiffs as well as defendants. In return for the concrete benefits achieved through a partial settlement – certainty of the agreed-upon recovery, availability of funds with which to pursue the remaining defendants and simplification of further proceedings – it is hardly unfair to ask plaintiffs to bear some risk of a total recovery lower than that which the jury might have awarded had all defendants stood trial.

Finally, despite petitioners' assertion to the contrary, the proportionate fault rule, like the doctrine of contribution itself, is no obstacle to voluntary pretrial settlement of Rule 10b-5 actions. During the two years since *Kaypro* was decided, numerous partial settlements have been approved in securities fraud class actions within the

Ninth Circuit, followed in many cases by global settlements resolving all of plaintiffs' claims. Indeed, due to the high probability that such actions will ultimately result in global settlements, the net administrative burden to judges and juries is probably lower under the *Kaypro* rule than under the seemingly simpler *pro tanto* rule preferred by the plaintiffs' bar.

III. ARGUMENT.

A. Sound Policy Considerations Support Recognition Of Contribution Rights Among Those Charged With Rule 10b-5 Violations.

1. It would be fundamentally unfair to vest plaintiffs with the unilateral power to determine who will and who will not be held accountable under Rule 10b-5.

It is in the class action context that the debate concerning contribution rights under Rule 10b-5 takes on its true significance, due to the staggering costs of litigating such suits and the huge sums that may exchange hands at settlement or after trial. According to petitioners herein, the denial of contribution rights will not materially affect the scope of such suits, as "everyone who has potential culpability and either money or insurance is swept into class actions." Brief for Petitioners ("Pet. Br.") at 37. This assertion, however, is palpably false. Petitioners themselves, the lawyers and accountants advising the defendants in *In re Cousins Sec. Litig.*, No. 84-1821-B(IEG) (S.D. Cal.), were not sued by the plaintiffs who prosecuted Cousins and its directors. But for the availability, under settled Ninth Circuit law, of a contribution cause of action under Rule 10b-5, they could never have been "swept into" the litigation at all, whether by means of a third-

party complaint or – as it happened in this case – a second lawsuit after the underlying action was concluded.

The case at bar thus neatly illustrates the dangers inherent in denying contribution rights under Rule 10b-5. Absent such rights, many potentially liable (and solvent) actors will never be called to account for their role in the alleged violation. By the same token, those unlucky enough to become plaintiffs' targets will be forced, absent contribution rights, to bear the *entire* litigation burden and judgment risk in such cases, regardless of their level of culpability.

It takes but a brief glance at the economic structure of securities fraud class actions to understand why, in many cases, plaintiffs' selection of defendants does *not* include "everyone who has potential culpability and either money or insurance." The lawyers representing the class are paid handsomely, out of the class recovery, after settlement or trial. *See, e.g., In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377, 1379 (N.D. Cal. 1989) (noting that nearly all fee awards range around 30% of the class recovery, and awarding over $1.5 million, or almost 33% of the settlement fund, in the case at bar). Hoping to be named class counsel, plaintiffs' attorneys feel intense pressure to file their lawsuits as quickly as possible.[1]

[1] If the stakes are high enough, this pressure can provoke a virtual stampede to the courthouse and require judicial mediation. In *In re Oracle Sec. Litig.*, 131 F.R.D. 688 (N.D. Cal. 1990), four separate securities fraud class action complaints (and one derivative complaint) had been filed the day after the issuer announced disappointing earnings and suffered a large drop in its stock price. Fourteen additional lawsuits were initiated over the next two weeks. A bitter control contest between plaintiffs' firms ensued, ultimately resolved by a court-ordered bidding process for the position of class counsel. In *In re Continental Illinois Sec. Litig.*, 750 F. Supp. 868 (N.D. Ill. 1990), *rev'd on other grounds*, 962 F.2d 566 (7th Cir. 1992), nine law firms appeared on behalf of various plaintiffs and fought for the role of lead class counsel. Forced to referee their intramural dispute, the court noted, "What is really at stake in this unseemly contest is the financial interest of the lawyers, although, of course, the rhetoric is couched in terms of the welfare of the class." 750 F. Supp. at 875.

Unfortunately, "[t]he pressure to be the first or among the first to file a complaint precludes extensive pre-filing factual investigation." Janet C. Alexander, *Do The Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 513-14 (1991). In their rush to court, it is all too easy for plaintiffs' attorneys to concentrate only upon those actors whose potential culpability and financial wherewithal are readily apparent from publicly-available sources. Those whose roles in the alleged fraud are more difficult to uncover, and those whose finances are not easily assessed, may well be overlooked. Moreover, given that Rule 10b-5 liability is joint and several,[2] once plaintiffs have sued one or more defendants *with* "potential liability and either money or insurance," they have little incentive to broaden the scope of the lawsuit thereafter.

Haste and lack of motivation on plaintiffs' part are not the only reasons to fear that, absent contribution rights, culpable actors will escape Rule 10b-5 litigation, leaving others – whose degree of fault may be much lower – to bear the entire burden and risk of suit. A no-

[2] *See, e.g., Globus v. Law Research Service, Inc.*, 318 F. Supp. 955, 956 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

contribution rule would encourage potential targets of Rule 10b-5 claims to engage in pre-filing bargaining with plaintiffs in an attempt to escape being named as defendants, inevitably raising the specter of collusion.[3] Indeed, given the high stakes in Rule 10b-5 class actions, the temptation for one potential defendant to exaggerate or even fabricate damaging information against another, in exchange for "immunity," could, in some cases, be overwhelming.

Contribution rights effectively guard against both dangers: inadvertence and collusion. Defendants, unlike plaintiffs, are strongly motivated to investigate and prosecute claims against those overlooked when the case was initially filed. Moreover, where contribution is available, potential defendants are unable to escape litigation by bargaining with plaintiffs alone. Thus, contrary to petitioners' contention, it is the *existence* of contribution rights that ensures, under current law, that "everyone with potential liability and either money or insurance" is "swept into" securities fraud class actions and, ultimately, that all culpable and solvent actors share the burdens and risks of Rule 10b-5 litigation.

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[3] *See* James S. O'Shaughnessy, *Judicial Implication of Contribution under Section 10(b) of the Securities Exchange Act: Is the New Branch on the Judicial Oak Threatened by Strict Statutory Construction?*, XVI Suffolk U. L. Rev. 983, 988-89 (1982) ("proscription of the right to contribution . . . encourages collusion and bribery between the plaintiff and potential defendants").

2. Rule 10b-5's scienter requirement is no reason to deny contribution rights to those charged by plaintiffs.

In an effort to defuse the powerful equitable arguments in favor of recognizing contribution rights among those faced with Rule 10b-5 claims, petitioners characterize contribution as "a right of a wrongdoer" and suggest that those "guilty" of securities fraud do not deserve to benefit from the doctrine. *See* Pet. Br. at 6, 14. The National Association of Securities and Commercial Law Attorneys ("NASCAT") is even more explicit: "Denying contribution to wrongdoers who act with scienter is by no means unfair. Anyone who wishes to avoid liability can easily do so by choosing not to commit securities fraud." Brief of *Amicus Curiae* National Association of Securities and Commercial Law Attorneys in Support of Petitioners ("NASCAT Br.") at 26.

Notably absent from these arguments, however, is any reference to the federal securities statutes that petitioners and NASCAT parse so closely elsewhere in their briefs. And for good reason: those statutes reveal that Congress had no particular liking for, and no inclination to perpetuate, the traditional common-law distinction between negligent and intentional tortfeasors, nor to deny contribution rights among the latter.

Section 11(f) of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. § 77k(f), explicitly authorizes contribution claims among those liable under Section 11(a), 15 U.S.C. § 77k(a), "unless the person who has become liable *was*, and the other *was not*, guilty of fraudulent misrepresentation." (Emphasis added.) Contribution between two persons *both* "guilty of fraudulent misrepresentation" has thus been affirmatively endorsed by Congress. Similarly,

Section 9(e) of the 1934 Act, 15 U.S.C. § 78i(e), explicitly permits contribution claims among those who "willfully" participated in manipulation of security prices. And Section 18(b) of the 1934 Act, 15 U.S.C. § 78r(b), permits contribution, without regard to level of fault, between persons liable for misleading statements filed with the SEC. Thus, all three explicit grants of contribution rights found in the federal securities statutes permit such rights to be asserted by intentional or willful "wrongdoers." Whatever Congress's intention might have been with respect to Section 10(b) of the 1934 Act and Rule 10b-5 (had it contemplated private litigation thereunder), it clearly did *not* intend to condition the availability of contribution claims for securities fraud on the claimant's lack of scienter.

Petitioners' sanctimonious characterization of contribution claimants as "wrongdoers" – morally undeserving of the "benefits" of contribution due to the allegedly "septic state" of their hands – suffers from a second flaw as well. A growing body of evidence suggests that neither the filing nor the settlement of a Rule 10b-5 class action is a reliable indicator of the "guilt" of any defendant. Instead, recent increases in the pace of such filings and the level of such settlements are attributable, at least in part, to the peculiar economics of securities fraud class litigation.

Securities class actions tend to be filed whenever an issuer's stock price suffers a precipitous decline large enough for the total potential damage award to the shareholders to support an award of attorneys' fees that would make it worthwhile to bring a case." Alexander, *supra*, 43 Stan. L. Rev. at 513. Professor Alexander's study – based on a group of Northern California "high-tech" companies

that went public in the 1980s – thus indicates that the institution of such a suit may have little to do with whether any actual fraud has occurred. *See id.* at 514. Other commentators agree. *E.g.*, Vincent O'Brien, *The Class Action Shake-Down Racket*, Wall St. J., Sept. 10, 1991, at A20 ("any company whose stock price declines is open to a class action suit"); Note, *Using Rule 9(b) to Reduce Nuisance Securities Litigation*, 99 Yale L.J. 1591, 1594 (1990) ("The inherent characteristics of . . . rule 10b-5 class action litigation, as well as the economic incentives facing a professional plaintiff's attorney, create strong incentives for the initiation of such actions").

Once a Rule 10b-5 lawsuit has been filed, it is relatively easy for plaintiffs to obtain an order certifying a class.[4] And once a class has been certified, defendants face powerful pressures to settle – as most of them do[5] – regardless of the merits of the charges against them. For one thing, it is cheaper for a plaintiff to prosecute such a case than for a defendant to resist it. This "litigation differential," which "exists independently of the merits of the plaintiff's claim," is particularly marked in Rule 10b-5 cases, where massive one-way discovery is the rule. Note, *supra*, 99 Yale L.J. 1596-97. Moreover, the size of the potential damages award in a class action, even where discounted to reflect a low probability of an adverse

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[4] Under federal law, the merits of the plaintiffs' claims are not considered at the class certification stage. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Moreover, given this Court's decisions in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), *reh'g denied*, 408 U.S. 931 (1972), and *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), the reliance element of a Rule 10b-5 claim rarely precludes class certification.

[5] *See* Part III(A)(4), *infra*.

verdict, is enough to give any defendant pause. Thus, as this Court noted in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978), "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."

The pendency of Rule 10b-5 claims also interferes with defendants' ordinary business activities, resulting in additional settlement pressure. "There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). "The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Id.* at 740.

Finally, many defendants in Rule 10b-5 actions are insured by policies prohibiting indemnification after an actual adjudication of fraud. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 715-16 (1986). In order to avoid even a low risk of such an adjudication at the hands of a capricious jury, many defendants (like the defendants in the *Cousins* litigation underlying this action) prefer to enter into settlement agreements which permit them to deny liability and tap their insurance policies to pay all or part of the settlement sum.

All of these factors combine to ensure that, under existing law, Rule 10b-5 class actions are often filed, prosecuted and ultimately settled in a manner that bears little or no relationship to the presence or absence of

actual fraud on the part of any defendant. Thus, it is simply not the case that "[a]nyone who wishes to avoid liability can easily do so by choosing not to commit securities fraud." NASCAT Br. at 26.[6] By the same token, it is somewhat disingenuous for petitioners and NASCAT to speak of contribution claimants – often, as in the case at bar, defendants who have settled or wish to settle the claims against them with no admission of liability – as "wrongdoers" who do not deserve the "benefits" of contribution.

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[6] A recent Ninth Circuit case, though not addressed to contribution issues, provides a good illustration of this point. In *Layman v. Combs*, No. 89-16621, 1992 WL 368854 (9th Cir. Dec. 17, 1992), plaintiffs sued numerous defendants pursuant to Rule 10b-5 and other laws for their losses resulting from investments in a thoroughbred horse breeding operation. The trial court granted summary judgment to defendants on certain claims and directed a verdict in their favor on others. The jury then returned a complete defense verdict on the remaining claims. Defendants' victory, however, was no bargain. Indeed, although they were fully exonerated of all charges of securities fraud, they hardly escaped "liability" in the broader sense of the word. As Judge Kozinski explained (dissenting from the majority's affirmance of the district court's rejection of seven defendants' counterclaims for legal fees): "This litigation – although it resulted in a complete defense victory, mostly on summary judgment – devoured a staggering quantity of productive resources. . . . *The attorneys' fees, for the seven defendants who requested them, amounted to more than $3.5 million. This says nothing of the fees incurred by the 13 plaintiffs and the 14 defendants who didn't request reimbursement.*" 1992 WL at *11 (emphasis added). "If this is the face of victory," Judge Kozinski asked, "how much uglier could defeat be?" *Id.* at *12 n.3. Undoubtedly, many securities fraud defendants ask themselves the same question when contemplating the steep price of seeking judicial exoneration.

3. The threat of contribution claims tends to increase the deterrence effect of Rule 10b-5.

It is easy to understand why so many lower federal courts have concluded that the availability of contribution rights adds to the power of Rule 10b-5 to deter fraud.[7] Put succinctly:

> To the extent that potential wrongdoers are aware of the rule allowing contribution, it can be said to deter violations by reducing the possibility that any participant in a securities fraud scheme will escape liability completely. Thus, a wrongdoer cannot hope to avoid liability simply because the plaintiff fortuitously may fail to include that wrongdoer as a defendant.

M. Patricia Adamski, *Contribution and Settlement in Multiparty Actions under Rule 10b-5*, 66 Iowa L. Rev. 533, 540 (1981) (footnotes omitted).

The contrary argument is also easy to state. Those who contend that contribution weakens the deterrent power of Rule 10b-5 reason, in essence, that persons contemplating securities fraud will be better deterred by a low risk that they could be held solely liable for the entire amount of any resulting damages than by a higher

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[7] *See, e.g., Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 727 n.7 (2d Cir. 1981); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 558 n. 44 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 459 U.S. 375 (1983); *Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672, 675 (9th Cir. 1980), *cert. denied*, 452 U.S. 963 (1981); *Heizer Corp. v. Ross*, 601 F.2d 330, 332 (7th Cir. 1979).

risk that they could be held liable for a portion of those damages. *See* NASCAT Br. at 16-17.[8]

Although NASCAT attempts to suggest otherwise in its brief, no circuit has endorsed this anti-contribution argument in a securities fraud case.[9] There are several reasons, moreover, why it should be treated with great suspicion. First, as this Court has previously acknowledged, "Economists disagree over whether business decisionmakers . . . are 'risk averse'; *i.e.*, [whether] they

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[8] There is, of course, a third possibility: that contribution has no effect upon deterrence at all, either because persons contemplating securities fraud do not bother to calculate its effects or because – as petitioners themselves assert – those effects are so unpredictable that potential tortfeasors "could not rationally take [contribution] into account in deciding how to act." Pet. Br. at 37-38. Curiously, petitioners appear either unaware of or unconcerned by the obvious inconsistency between this statement and their contention, elsewhere in their brief, that a no-contribution rule "would be the most effective deterrent of violation of securities laws." *Id.* at 9.

[9] *See* NASCAT Br. at 17 n.17. The two securities opinions cited therein – only one of which was an appellate decision – stop well short of concluding that a no-contribution rule would enhance the deterrence effect of Rule 10b-5. *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989), involved Section 12(2) of the 1933 Act, 15 U.S.C. § 77l(2). The court stated, "It is *unclear* whether a federal right of action for contribution would promote the general purposes of the federal securities laws," then, based on the language of § 12(2), held that no indemnity or contribution claims were permitted under that section. 876 F.2d at 1105-06 (emphasis added). In *In re Olympia Brewing Co. Sec. Litig.*, 674 F. Supp. 597, 616 n.20 (N.D. Ill. 1987), the district court was even more tentative, noting only that certain "contemporary analysis" indicates that a no-contribution rule "*may* provide *as great* a deterrent . . . as a rule permitting contribution," then expressly announcing, "This court takes *no position* on the issue here." (Emphasis added.)

would prefer a greater certainty of a small loss to a less certain chance of a greater loss." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 636 n.8 (1981). Although encouraged to do so by the parties and numerous *amici* in that antitrust action, the Court in *Texas Industries* pointedly refused to resolve the debate, thus leaving one of the fundamental assumptions underlying the anti-contribution argument unresolved.[10]

Even if this Court were to believe that a no-contribution rule would best deter *antitrust* violations, it should not apply the same logic to the field of securities fraud litigation.[11] The plaintiffs' securities bar, as noted in Part

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[10] Indeed, even the strongest proponents of the anti-contribution view – the three University of Chicago Law School scholars (two of whom have since become federal judges) who developed the economic argument adopted by NASCAT herein – admitted, in their seminal article, that "the extent and intensity of risk aversion among firms is an unsettled empirical question." Frank H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. Law & Econ. 331, 353 n.50 (1980). More than a decade later, this question remains, at best, unsettled. *See* John A. Langmore & Robert A. Prentice, *Contribution Under Section 12 of the Securities Act: The Existence and Merits of Such a Right*, 40 Emory L.J. 1015, 1079-80 (1991) (noting that "[m]ore recent evidence indicates that individuals are not uniformly risk-averse" and concluding that, "it is *incorrect* to assume that the smaller threat of a bigger penalty deters wrongful conduct more effectively than the more certain threat of a smaller penalty" (emphasis added).)

[11] It should be noted, in this regard, that only one of the scholarly analyses cited by NASCAT to support its conclusion that contribution weakens deterrence addresses the specific issue of securities fraud. And that article, in turn, draws heavily and uncritically on the seminal work of the Chicago scholars in the antitrust field. Mark J. Lowenstein, *Implied Contribution*

III(A)(1), *supra*, is subject to intense economic pressure to file class action complaints in great haste, with little opportunity for thorough investigation of all potential defendants. Antitrust plaintiffs, on the other hand, do not ordinarily feel the same compulsion to race to the courthouse, and thus are less likely to overlook potentially culpable and solvent defendants. Moreover, securities fraud plaintiffs do not need to allege or establish any conspiracy, agreement or common course of conduct to state an actionable claim under Rule 10b-5 (or, for that matter, to recover the highest possible damages).[12] Antitrust plaintiffs, however, are virtually compelled, by the nature of the claims they assert, to proceed against multiple defendants. *See* Easterbrook, Landes & Posner, *supra*, 23 J. Law & Econ. at 344 (noting that their analysis is "tailored to cases in which there can be no harm unless one or more wrongdoers collaborate").

For both of these reasons, securities fraud plaintiffs are less likely than antitrust plaintiffs to name all potentially liable actors as defendants. Therefore, in the absence of contribution rights, violators of the securities laws are more likely than violators of the antitrust laws to escape the burdens and risks of litigation altogether. By the same token, the availability of contribution rights increases the risk that securities law violators will be called to account to a greater degree than it increases the same risk for antitrust violators. This fundamental

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Under the Federal Securities Laws: A Reassessment, 1982 Duke L.J. 543, 556-57 & 572-73 (1982).

[12] Indeed, Rule 10b-5 defendants need not even admit to any concerted action in order to state contribution claims against co-defendants or third parties. *See Marrero v. Abraham*, 473 F. Supp. 1271, 1276-78 (E.D. La. 1979).

change to the risk calculus underlying the work of the Chicago scholars renders their conclusions – even if otherwise supportable – inapplicable to the case at bar. In the unique arena of large-scale securities fraud litigation, contribution is the best and perhaps the only mechanism for ensuring that all culpable actors are called to account. As such, contribution rights can only increase the deterrence effect of Rule 10b-5.

4. The availability of contribution rights has no adverse effect on the ability of litigants to fashion just pretrial settlements in Rule 10b-5 cases.

Petitioners claim that "[c]ontribution . . . makes securities actions unjustifiably difficult to settle." Pet. Br. at 9. Given the dramatic empirical evidence to the contrary, this assertion must be viewed, at best, as hyperbole.

The first reported federal decision authorizing contribution claims under Rule 10b-5 was *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809 (D. Colo. 1968), *aff'd in part, rev'd in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970). For more than two decades thereafter – as one court after another agreed with *deHaas* and recognized the contribution rights of Rule 10b-5 defendants – the pace of settlements in such cases apparently *increased*. By the early 1990s – when every circuit which had spoken on the issue agreed that contribution rights were available under Rule 10b-5 – securities fraud class actions were significantly *more* likely to settle than other types of civil litigation. *Compare* Thomas M. Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits*, 60 B.U. L. Rev. 542, 544-47 (1980) (71% of shareholder class and derivative actions tracked throughout the 1970s settled before trial) *with* O'Brien, *supra* (96%

of securities fraud class actions over past three years settled out of court, compared to 60-70% for other civil cases). *See also* Alexander, *supra*, 43 Stan. L. Rev. at 525 ("the settlement rate for securities class actions is much higher than for civil litigation generally"); Melvyn I. Weiss, *Class Action Suits Are a Shield for Shareholders*, Wall St. J., Jan. 30, 1992, at A13 (conceding, in response to O'Brien, that "most securities class actions are resolved through settlement").

Even assuming, *arguendo*, that a no-contribution rule might increase the pace (or the level) of settlements in securities fraud actions, the possibility of this result, standing alone, would hardly justify the adoption of such a rule by this Court.

> Trial courts in which litigation is pending have a natural desire to clear court dockets of complex litigation in an expeditious a manner as possible. *This desire, however, is tempered by the need to assure factual fairness and the correct application of legal principles.*

Kaypro, 884 F.2d at 1225 (emphasis added). While the federal courts rightly encourage fair settlements, no responsible jurist or commentator suggests that settlement should be a goal in and of itself, regardless of the merits of the litigation. As noted in Part III(A)(2), *supra*, existing law tends to coerce settlements in Rule 10b-5 class actions, even where plaintiffs' claims are tenuous at best. There is no justification for a rule of law that would put further pressure on innocent actors to settle.

B. Sound Policy Considerations Support The Endorsement Of The *Kaypro* Proportionate Fault Rule By This Court.

Petitioners' final policy argument against the recognition of contribution rights in Rule 10b-5 cases is their

claim that the need for the lower federal courts to fashion contribution bar rules for use in partial settlement cases "causes confusion and case management problems in the lower federal courts." Pet. Br. at 39. They contend that neither the proportionate fault approach endorsed by the Ninth Circuit in *Kaypro* nor the *pro tanto* approach adopted in *Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989), *cert. denied*, 111 S. Ct. 232, 493 U.S. 1024 (1990), is "satisfactory." *Id.* Therefore, petitioners reason, it would be best for this Court simply to abandon the entire notion of contribution.

What petitioners overlook is that the "problems" they posit will face the lower federal courts in the vast majority of securities fraud actions *regardless* of whether contribution rights are available under Rule 10b-5. Most cases arising out of public offerings of securities (like *Cousins* itself) include, in addition to Rule 10b-5 counts, claims under Section 11 of the 1933 Act, which expressly permits contribution.[13] Moreover, many Rule 10b-5 cases – including open-market class actions and even customer disputes – include one or more pendent claims pleaded under state blue sky statutes or common law. In a growing number of jurisdictions, these counts also require the courts "to consider how to administer contribution

[13] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 380-87 (1983) (fraudulent registration statements are actionable under both § 11 and Rule 10b-5). Moreover, given that § 11 does not require any showing of scienter, it would be unrealistic in the extreme to expect a plaintiff to forego a § 11 claim merely to avoid the "complications" stemming from its contribution provision.

fairly." Pet. Br. at 38.[14] Thus, the no-contribution rule sought by petitioners under Rule 10b-5 would not significantly relieve the lower federal courts – or the litigants – of any administrative burden when fashioning settlement agreements.

As for the claim that the current *conflict* between the circuits is the cause of unacceptable "confusion" in the trial courts, Pet. Br. at 39, this Court, of course, is uniquely situated to resolve that conflict and alleviate any such confusion. In fact, SIA agrees with NASCAT that this Court should (in addition to recognizing a right to contribution in Rule 10b-5 cases) "giv[e] lower courts and litigants some indication of just *what* that right to contribution *is*." NASCAT Br. at 27 (emphasis in the original).

[14] *See, e.g.*, Cal. Corp. Code § 25505 (expressly authorizing contribution claims based on proportionate fault under state securities statutes); *Harrison v. Sheats*, 608 F. Supp. 502 (E.D. Cal. 1985) (approving partial settlement in securities fraud action containing claims under federal and California securities statutes and common law fraud, all requiring consideration of contribution rights); *Ballis v. Evans*, No. 84C9340, 1986 WL 12274, at *2 (N.D. Ill. Oct. 28, 1986) (concluding, in action arising out of sale of oil well interests, that contribution rights are available under Illinois common law as well as federal securities laws, but that defendant's third-party complaint failed to state contribution claim); *McLean v. Alexander*, 449 F. Supp. 1251, 1265 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979) (holding, in action arising out of sale of common stock, that "[i]n addition to the right of contribution under federal securities laws, defendant has a statutory right to contribution under [Delaware] state law"). These state-law claims often entitle plaintiffs to seek punitive or emotional distress damages or enjoy other advantages unavailable under Rule 10b-5. Thus, once again, it is unlikely that the "complications" flowing from the availability of contribution will cause plaintiffs to abandon them when filing Rule 10b-5 actions.

1. The proportionate fault rule is most consistent with the basic fairness notions underlying the doctrine of contribution.

The first few courts to authorize contribution claims in Rule 10b-5 cases apportioned damages on a *pro rata* or "per head" basis. *E.g., Globus,* 318 F. Supp. at 957-58. Judges and commentators quickly moved away from that approach, however, for reasons well summarized in *Smith,* 827 F.2d at 561. Noting that Congress did not likely intend the *pro rata* rule to be used under the 1933 and 1934 Acts, and that the administrative convenience it afforded was "minimal," the Ninth Circuit opted to apportion liability according to the relative culpability of the parties. The court concluded that such a rule:

> appears especially appropriate in securities fraud cases which include numerous defendants with potentially vast differences in culpability. *Contribution is an equitable doctrine. To apportion damages without regard to fault reduces, to an extent, the equity which the doctrine was intended to provide.* . . . This court, therefore, finds the relative culpability measure appropriate.

Id. (Emphasis added.)

Two years later, in *Kaypro,* the Ninth Circuit applied the same equitable principles to partial pretrial settlements in Rule 10b-5 actions. Under *Kaypro,* once a partial settlement is approved by the trial court pursuant to Fed. R. Civ. P. 23, the nonsettling defendants are "barred from further rights of contribution from the settling defendants." 884 F.2d at 1231. Thereafter, should the plaintiffs proceed to trial against the remaining defendants, the jury is asked to determine:

> the percentage of culpability of each of the nonsettling defendants as well as that of the settling defendants. Nonsettling defendants as a whole

> will then be required to pay the percentage of the total amount for which they are responsible . . . and will continue to have rights of contribution [governed by the proportionate fault rule of *Smith*] against one another.

Id.

The Second Circuit, on the other hand, has never moved away from the *pro rata* rule first accepted – with virtually no analysis – in *Globus. See, e.g., Herzfeld v. Laventhol, Krekstein, Horwath & Horwath,* 540 F.2d 27, 39 (2d Cir. 1976). Because that court has never committed itself to apportioning liability equitably in the absence of a settlement, it is not surprising that it gives equally short shrift to equitable principles in fashioning a rule for use in partial settlement cases. Instead, under the *pro tanto* rule announced in *Singer,* the nonsettling defendants will automatically become liable for the entire amount of the damages found by the jury, less "a credit of the settlement amount." 878 F.2d at 600.

The injustice inherent in the *Singer* scheme is readily apparent. Indeed, it effectively operates to reinstate the very inequities that contribution is intended to prevent, by encouraging collusion between plaintiffs and settling defendants and rendering nonsettling defendants arbitrarily liable for sums that may bear no relationship to their culpability. *See Kaypro,* 884 F.2d at 1230. Worse yet, even if the trial court conducts a rigorous "fairness hearing" before approving a partial settlement,[15] the *pro tanto*

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[15] In an attempt to mitigate the harshness of the *pro tanto* rule, many courts conduct an in-depth review of the proposed partial settlement – designed to ensure that the settling defendants are paying an appropriate share – before approving it and entering a contribution bar. *See, e.g., In re Atlantic Fin. Manage-*

rule almost always forces the nonsettling defendants to pay *more than* their fair share of any liability assessed by the jury, because a "fair" settlement payment invariably incorporates a cost and/or risk discount. *Id.* The *pro tanto* rule thus improperly penalizes nonsettling defendants for exercising their rights to trial.

As between the two models examined above, only *Kaypro* is faithful to the equitable principles underlying the doctrine of contribution itself. It permits defendants to settle without risk of contribution claims thereafter, yet it neither penalizes nor rewards nonsettling defendants for exercising their right to trial. Instead, those nonsettling defendants continue – as they should – to face a risk of liability proportionate to their level of culpability. As the Second Circuit itself admitted, "the proportionate method is always consistent with fault." *In re Masters Mates & Pilots*, 957 F.2d at 1029.

2. The proportionate fault rule does not unfairly disadvantage plaintiffs.

According to NASCAT, the proportionate fault rule set out in *Kaypro*, though it may be fair to *defendants*, is unfair to *plaintiffs* because it requires them to "forfeit their right to be made whole when liability is established

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ment Inc. Sec. Litig., 718 F. Supp. 1012, 1017 (D. Mass. 1988). *Singer* itself made no mention of any pre-settlement fairness hearing as a precondition to a contribution bar. Three years later, however – in a class action arising under the pension laws rather than the securities laws but likely intended to be applicable to Rule 10b-5 cases – the Second Circuit stated that a district court must conduct such a hearing before approving a partial settlement and entering a contribution bar. *In re Masters Mates & Pilots Pension Plan and IRAP Litig.*, 957 F.2d 1020, 1031-32 (2d Cir. 1992).

after trial." NASCAT Br. at 18, 20. As an example, NASCAT constructs a hypothetical case in which plaintiffs settle with one defendant for $100,000, then convince the jury, after trial against the remaining defendant, that their total damages are $10 million. Under *Kaypro*, they point out, the jury might determine that the nonsettling defendant was only 50% liable for their damages, thus limiting their recovery to $5 million from that nonsettling defendant and their total recovery to $5.1 million, $4.9 million less than they theoretically would have been entitled to had they proceeded to trial against both defendants. *Id.* at 21-22.

What its critics tend to ignore, however, is that the *Kaypro* rule could just as easily work in plaintiffs' favor.[16] Indeed, the Ninth Circuit explicitly recognized that the rule it adopted could lead to a plaintiffs' windfall. *Kaypro*, 884 F.2d at 1231-32 (discussing the "one satisfaction rule" and determining that it would not be violated where "plaintiffs are merely receiving more money than they *might* have in different circumstances") (emphasis in the original).[17]

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[16] If, in the same $10 million case, the first defendant paid $6 million in settlement and the jury determined that the second defendant was 90% liable for plaintiffs' damages, plaintiffs would be permitted to collect $9 million from that second defendant, for a total recovery of $15 million, $5 million *more* than if they had proceeded to trial against both defendants. Even if the jury returned a defense verdict, plaintiffs would still be left with their $6 million settlement payment from the first defendant, which would, under those circumstances, be $6 million more than the jury intended them to recover.

[17] Both petitioners and NASCAT argue that *Kaypro* encourages the nonsettling defendant to pursue the "empty chair" defense; that is, to attempt, at trial, to convince the jury that the

Even if the *Kaypro* rule tended, on balance, to result in a lower recovery to plaintiffs than the total damages awarded by the jury, it should not, for that reason, be rejected as unfair. Contrary to NASCAT's contentions, a plaintiff who has accepted the benefits of a pretrial settlement has no inherent "right," thereafter, to be "made whole." A settlement agreement, by definition, entails compromise. It necessarily requires each settling party to give up rights it would otherwise preserve through trial. Indeed, when a simple one plaintiff/one defendant lawsuit settles, plaintiff obtains a certain and prompt recovery but, to the extent that the agreed-upon payment is lower than the total damages claimed (as it almost always is), must also relinquish all hope of being "made whole."

Similarly, when plaintiffs in a multi-party action enter into a partial pretrial settlement with some but not all defendants, they obtain a certain and prompt recovery and insure themselves against the risk that they may recover nothing at trial. In addition, a partial settlement tends to strengthen plaintiffs' case against the remaining

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absent settling defendant was primarily to blame for plaintiffs' losses. *See* Pet. Br. at 39; NASCAT Br. at 22. As a practical matter, however, such a strategy may actually increase the risk, to the nonsettling defendant, of an adverse verdict on the threshold question of liability. *See* Langmore & Prentice, *supra*, 40 Emory L.J. at 1095 (noting that, where contribution claims among defendants are tried together with plaintiff's claims, "by the time defendants are done pointing fingers at each other, they have gone a long way toward making the plaintiff's case"). Moreover, it is by no means obvious that the plaintiff is worse off in an "empty chair" trial – when it can focus all of its efforts on attacking the nonsettling defendant – than it would have been had it proceeded to trial against all defendants and been required to construct a case against each.

defendants by providing them with a "war chest" to fund their efforts and by permitting them to concentrate, thereafter, only upon the liability of the nonsettling defendants. *See Kaypro*, 884 at 1225; *United States Fidelity & Guar. Co. v. Patriot's Point Dev. Auth.*, 772 F. Supp. 1565, 1575 (D.S.C. 1991). It is hardly unfair to ask plaintiffs, after accepting these benefits, also to accept *some* risk that their total recovery after trial may be lower than it might have been had there been no settlement.

3. The proportionate fault rule does not impede fair settlements nor unduly burden the courts.

Once again indulging a penchant for hyperbole, petitioners assert that the proportionate fault rule "has nearly terminated partial settlements of class actions in the Ninth Circuit." Pet. Br. at 39. In fact, the trade press has reported many such settlements within the Ninth Circuit since *Kaypro* was decided.[18] And in more than a few of

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[18] See Securities Class Action Alert, Vol. 5, No. 12, at 19 (Dec. 1992) ($1.25 million paid in *Klein v. King*, No. C-88-3141-FMS (N.D. Cal.)); *id.*, Vol. 5, No. 9, at 10 (Sept. 1992) (over $2.8 million in cash paid and $8.5 million in stock issued in *In re L.A. Gear Sec. Litig.*, Master File No. 90-2832-KN (C.D. Cal.)); *id.*, Vol. 5, No. 4, at 43 (Apr. 1992) and Vol. 5, No. 3, at 20 (Mar. 1992) ($425,000 paid pursuant to two different partial settlement agreements in *In re Ramtek Sec. Litig.*, No. C-88-20195-JW (N.D. Cal.)); *id.*, Vol. 5, No. 8, at 32 (Aug. 1992) ($15 million paid in *Roberts v. Heim*, Nos. C-84-8069-TEH, C-87-6174-TEH and C-88-3373-TEH (N.D.Cal.)); *id.*, Vol 5, No. 4, at 34 (Apr. 1992) ($9.5 million paid in *In re Precious Metals Dealers Litig.*, Nos. 90-5124-RSWL, 91-5085-RSWL, 91-5086-RSWL, 91-5087-RSWL and 91-5333-RSWL (C.D.Cal.)); *id.*, Vol. 5, No. 9, at 1 (Sept. 1992), Vol. 5, No. 5, at 1 (May 1992) and Vol. 3, No. 9, at 15 (Sept. 1990) (over $225 million paid pursuant to

those cases plaintiffs were represented by the same firms that now criticize *Kaypro*, in their *amicus* brief, on the ground that it "impairs settlement." NASCAT Br. at 27.

A moment's reflection, moreover, reveals that if the proportionate fault rule inhibits settlement at all, only inadequate settlements are impeded. When settling defendants pay their appropriate share, plaintiffs have nothing to fear from the operation of the *Kaypro* rule at trial. *See In re Sunrise Sec. Litig.*, 698 F. Supp. 1256, 1259 (E.D. Pa. 1988) ("the only settlements which the *pro tanto* rule would produce that the proportional rule would not are ones in which a defendant settles for less than his likely share of liability at trial"). As noted in Part III(A)(4), *supra*, the judiciary's preference for settlement over trial is intended to encourage equitable out-of-court

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three different partial settlement agreements in *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, MDL No. 834 (D. Ariz.)); *id.*, Vol. 4, No. 10, at 7 (Oct. 1991) ($6.8 million paid in *In re Melridge, Inc. Sec. Litig.*, Master File No. 87-1426-JU (D. Or.)); *id.*, Vol. 4, No. 9, at 20 (Sept. 1991) ($26 million in cash plus stock paid in *In re Software Toolworks Inc. Sec. Litig.*, Master File No. 90-2906-FMS (N.D. Cal.)); *id.*, Vol. 4, No. 7, at 19 (July 1991) (over $20 million paid by law firm defendants in *Bertiand v. Industrial Dev. Auth.*, CIV 89-1087-PHX-RCB (D. Ariz.), after prior partial settlement reached with accountants); *id.*, Vol. 4, No. 5, at 27 (May 1991) ($775,000 paid in *Appleton v. McGladrey & Pullen*, MDL-841-R (C.D. Cal.)); *id.*, Vol. 4, No. 7, at 15 (July 1991) ($10.1 million paid in *In re Beverly Hills Sav. & Loan Ass'n Sec. Litig.*, Master File No. 85-3157 RMT (C.D. Cal.)); *id.*, Vol. 4, No. 6, at 15 (June 1991) ($7.25 million paid in *Tonnemacher v. Sasak*, CIV 89-0201-PHX-SMM (D. Ariz.)); *id.*, Vol. 3, No. 4, at 15 (Apr. 1990) ($1 million paid in *Securities Investors Protection Corp. v. Vigman*, CV-4742-AWT (C.D. Cal.)); *id.*, Vol. 3, No. 3, at 11 (Mar. 1990) ($10 million paid in *Stein v. Marshall*, Master File No. 89-0066-PHX-CAM (D. Ariz.)); *id.*, Vol. 3, No. 3, at 37 (Mar. 1990) ($4.85 million paid in *In re FPI/Agretech Litig.*, MDL No. 763 (D. Haw.)).

resolutions, not coercive settlements unrelated to the merits of the litigation.

Finally, petitioners and NASCAT argue that trial after a partial settlement is more cumbersome under the *Kaypro* rule than under the *pro tanto* rule. *See* Pet. Br. at 39; NASCAT Br. at 24. This perceived disadvantage, however, must be balanced against the fact that the partial settlement process itself is more cumbersome in most *pro tanto* jurisdictions – due to the intensive fairness hearing required at that stage – than it is in the Ninth Circuit. *See In re Atlantic*, 718 F. Supp. at 1017 (noting that a fairness hearing, unlike an ordinary Rule 23 hearing, requires the court to assess "the strength of plaintiffs' case against each defendant as to liability and the relative blameworthiness of its conduct"); *In re Masters Mates & Pilots*, 957 F.2d at 1032 (adding that the district court "should conduct an *evidentiary* hearing when one is sought") (emphasis added). Moreover, partial settlements are frequently followed by global settlements that resolve all of plaintiffs' claims and obviate any need for trial.[19] Thus, on balance, the *Kaypro* rule – which does not require judges or juries to assess the relative culpability of settling and nonsettling defendants unless and until the case goes to trial – may more effectively conserve judicial resources than the seemingly simpler *pro tanto* rule.[20]

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[19] Indeed, three years after *Kaypro* itself was decided, the remaining defendants settled with plaintiffs. *See* Securities Class Action Alert, Vol. 5, No. 9, at 46 (Sept. 1992).

[20] As for the danger of "second generation" lawsuits posed by the decision below, *see* NASCAT Br. at 24, SIA respectfully suggests that this Court could easily curtail such litigation without doing violence to the principle of proportionate fault. Because a claim for contribution ordinarily accrues when the

IV. CONCLUSION.

For all of the reasons stated above, SIA urges this Court to recognize rights of contribution among those charged with violating Rule 10b-5, and to mandate that liability be apportioned according to their relative culpability.

Dated: December 31, 1992.

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claimant itself is charged with misconduct, not when it settles or is adjudicated liable, a Rule 10b-5 defendant may, if it so chooses, assert whatever contribution claims it has against non-parties pursuant to Fed. R. Civ. P. 14(a) during the pendency of the case against it. *See Marrero*, 473 F. Supp. at 1275 ("Every court that has considered the question has allowed additional tortfeasors in Rule 10b-5 cases to be joined as third-party defendants when the plaintiff has failed to join them as direct defendants") (citations omitted). It would be not be unreasonable for this Court prospectively to require a Rule 10b-5 defendant to avail itself of Rule 14(a) prior to settling with plaintiffs, on pain of losing its contribution rights thereafter. This would permit the district court to deal with all potentially liable parties, and all contribution issues, in one action, obviating any need for follow-on suits.

* The above-listed attorneys gratefully acknowledge the assistance of Ronit Setton, an employee of Orrick, Herrington & Sutcliffe who recently passed the New York bar examination and will shortly be sworn into the bar.

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Petitioners,

—v.—

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

PRELIMINARY STATEMENT

Pursuant to Rule 37.3 of the Rules of this Court, the American Institute of Certified Public Accountants (the "Institute") respectfully submits this brief as *amicus curiae* in support of the position of the respondents that there exists an implied right of action for contribution under Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5. This brief is

submitted on written consents of the parties, which have been filed contemporaneously herewith.

INTEREST OF THE INSTITUTE AS *AMICUS CURIAE*

The Institute is the national professional accounting organization, all of whose more than 300,000 members are certified public accountants. Among the Institute's purposes are the promotion and maintenance of high professional standards of practice. In the pursuit of those ends, the Institute has come to be accepted as the authoritative source of standards and procedures in the accounting profession.

As the issuer of these standards, the Institute has a profound interest in the scope and bases of civil liability sought to be imposed upon accountants and auditors under Section 10(b) of the 1934 Act and Rule 10b-5.[1] The Institute also has a profound interest in the availability and contours of the right of defendants to seek contribution under Section 10(b) and Rule 10b-5. Accountants are routinely named as defendants in 10b-5 actions, merely on the basis of their having independently audited the financial statements of their clients. Even though they are typically less responsible than their clients and other affiliated persons, who ultimately control the financial reporting process, accountants are often viewed as preferred defendants by disgruntled investors searching for the most solvent "deep pocket" they can find when their investments turn sour. Without a right of contribution, accountants may be required to

1 The Institute was invited to and did submit a position paper to the United States Senate concerning the proposed scope of civil liabilities and damages under the 1934 Act. *Hearings on S. Res. 84 (72d Cong.), S. Res. 56, and S. Res. 97 Before the Comm. on Banking and Currency*, 73d Cong., 1st Sess., pt. 15, at 7207-10 (1934). In addition, this Court has permitted the Institute to file briefs as *amicus curiae* on related securities law issues in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Aaron v. SEC*, 446 U.S. 680 (1980); and *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

bear the bulk of the burden while the primarily responsible parties pay little or nothing.

Because of its disproportionate exposure to liability under Section 10(b) and Rule 10b-5, the accounting profession is greatly disturbed by petitioners' request that this Court overrule a quarter-century of well-settled law permitting defendants to seek contribution in cases brought under Section 10(b) and Rule 10b-5. Such a result would dramatically increase the likelihood that accountants will incur liability wholly out of proportion to their relative responsibility in pending and future cases under Section 10(b) and Rule 10b-5, and thus would have a substantial detrimental impact upon the accounting profession.

SUMMARY OF ARGUMENT

In order not to burden the Court with matters that have already been brought to its attention by the parties to this action, the Institute will not address in this brief the legal arguments concerning whether Congress would have provided for a right of contribution under Section 10(b) had the question arisen. In short, the Institute submits that the answer to this question is plainly yes, given that Congress specifically provided for a right of contribution under the most comparable express provisions of the 1934 Act. Accordingly, following its highly analogous opinion in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), the reasoning of which is virtually dispositive here, the Court should similarly look to the express contribution provisions of the 1934 Act as a basis for implying a right of contribution for the 10b-5 implied cause of action.

The Institute also hereby joins in the legal arguments presented by respondents Peat Marwick Main & Co. and K.M.G. Main Hurdman demonstrating the propriety of a right of contribution in Section 10(b) actions. Rather than reiterate those arguments here, the Institute will focus on the pertinent policy

considerations in the event the Court deems it appropriate to consider them. While the Court need not balance the relevant policies in order to recognize a Section 10(b) right of contribution (since Congress has already done so in electing to permit contribution under the comparable express provisions of the 1934 Act), it is significant that all of the relevant policy considerations strongly favor recognition of such a right.

First, contribution is essential to effectuate the principle of fairness. The typical 10b-5 action involves multiple defendants of varying degrees of responsibility, and it is both inequitable and irrational to require one or more defendants to bear the entire loss while other, more responsible parties escape liability altogether. Indeed, given the inviting presence of deep pocket targets such as accounting firms and other outside professionals, plaintiffs may elect not to sue the most responsible persons at all, which only exacerbates the unfairness of a no-contribution rule. Such a rule is particularly unfair to accounting firms, whose virtually limitless potential liability for auditing their clients' financial records is vastly disproportionate both to their relative responsibility and to the compensation they receive.

Second, contribution promotes the policy of deterrence that underlies the federal securities laws. Without the threat of a contribution action, corporate insiders may be more willing to engage in misconduct on the assumption that potential plaintiffs will bypass them in favor of pursuing the deep pocket outsiders. With contribution, all potential defendants know that they may be responsible for a portion of the damages, regardless of whether the plaintiff elects to sue or pursue them.

Third, contrary to the arguments of its opponents, contribution neither discourages settlements nor impairs judicial efficiency. The available empirical evidence indicates that nearly all 10b-5 actions have settled, and continue to settle, notwithstanding the availability of contribution. The only settlements which a rule of contribution inhibits are those which are collusive or patently unfair to non-settling defendants.

Finally, while the question of the method of apportioning damages among parties seeking contribution is not before the Court, the Institute considers it necessary to respond here to the arguments that have been advanced by *amicus curiae* National Association of Securities and Commercial Law Attorneys ("NASCAT") against the adoption of a "proportional" or "comparative" fault approach. Contrary to NASCAT's arguments, the proportional fault approach to the apportionment of damages in 10b-5 actions is by far the most efficacious one in promoting the policies of fairness and deterrence which underlie the right of contribution.

ARGUMENT

I.

PUBLIC POLICY REASONS STRONGLY SUPPORT ALLOWING A RIGHT TO CONTRIBUTION UNDER SECTION 10(b) AND RULE 10b-5.

If, as the Institute urges, the Court concludes that had Congress adopted an express Section 10(b) cause of action it "would have balanced the policy considerations" implicit in any rule of contribution in the same manner as it did in the comparable provisions of the 1934 Act, then the inquiry "should be at an end." *Lampf*, 111 S. Ct. at 2780. Alternatively, while it is unnecessary to do so in order to recognize a right of contribution, the Court may elect to weigh "what may be described as policy considerations" in fleshing out the parameters of the 10b-5 cause of action. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975); *cf. Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2764 (1991) (Court has power to "round[ ] out" the substance of an existing implied right of action to ensure fair application of the law).

While petitioners and their *amicus* have undertaken a forced effort to invoke public policy reasons for denying a right to contribution, their arguments are unpersuasive. As the over-

whelming majority of courts and commentators have concluded, time and again after thorough consideration, the pertinent policy considerations strongly favor allowance of a right of contribution. As one particularly thorough commentary recently observed:

> Alone or together, the most common arguments simply do not support a denial of contribution. These arguments have been debated repeatedly over the past sixty years and in jurisdiction after jurisdiction the pro-contribution position has prevailed. Indeed, it has been transformed from an "exception to the rule" into a "vibrant and complex facet of the law."

Langmore & Prentice, *Contribution Under Section 12 of the Securities Act of 1933: The Existence and Merits of Such a Right*, 40 EMORY L.J. 1015, 1098 (1991).

For sound policy reasons, contribution has been an integral part of litigation under Section 10(b) and Rule 10b-5 for nearly twenty-five years. A careful analysis of the policy considerations applicable to the right of contribution under those provisions supports a continuation, rather than destruction, of this long-accepted and highly important right.

A. Fundamental Fairness Requires an Allowance for 10b-5 Contribution.

Probably the most compelling justification for permitting contribution in Rule 10b-5 actions is that simple fairness requires it. Numerous parties with varying degrees of responsibility for a Section 10(b) violation may be pronounced liable by a finder of fact, and it is unfair to require one or more of such defendants to bear the entire loss while others escape liability altogether. *See Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185-86 (8th Cir. 1979) ("There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with

the other wrongdoer"); *Gomes v. Brodhurst*, 394 F.2d 465, 467-68 (3d Cir. 1967) ("There is no longer a legitimate place in our system, if, indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss. Such a philosophy stems from a more ancient day which more easily intermingled penal and compensatory considerations.").

This Court's prior decisions recognize this same principle. For example, in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974), the Court recognized a right of contribution among joint tortfeasors in admiralty cases, reasoning that "a 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." And in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), the Court adopted the doctrine of comparative negligence in maritime cases in order to promote "the 'just and equitable' allocation of damages," adding that "worldwide experience has taught that that goal can be more nearly realized by a standard that allocates liability for damages according to comparative fault whenever possible." *Id.* at 411. Neither the simplicity nor the intuitive appeal of this principle renders it any less compelling.

The harshness of a no-contribution rule is greatly exacerbated when a minimally culpable party must bear most or even all of the economic liability, while more culpable parties pay little or nothing—or may not even be sued at all. Indeed, a no-contribution rule virtually assures that Rule 10b-5 actions will often produce such an unfair result, since "[n]umerous parties with varying degrees of participation in the fraudulent scheme may be responsible for a violation of section 10(b)." Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 IOWA L. REV. 532, 541 (1981).

The typical multi-party 10b-5 lawsuit involves, broadly speaking, two groups of defendants—corporate issuers of securities and their director/managers, on the one hand ("corporate insiders") and the corporation's outside professional advisors, on the other.[2] Among the outside advisors habitually named by plaintiffs as 10b-5 defendants are accountants who have performed an independent audit of the client corporation's financial statements.[3] A rule denying contribution in 10b-5 actions would be particularly unfair to accounting firms, which have come to bear the brunt of an epidemic of securities litigation that is spreading throughout the accounting profession and the business community.

In 1990 and 1991, a record 614 securities class action suits were filed in the federal courts, exceeding the total number of similar suits filed in the previous five years. *See* 138 Cong. Rec. S12604 (daily ed. Aug. 12, 1992) (statement of Sen. Sanford on S. 3181, Securities Private Enforcement Act of 1992).[4] Given the high concentration of these lawsuits on a relatively small number of accounting firms, the impact of this litigation explosion upon the accounting profession has been "particularly acute," *id.*, and has resulted in virtually limitless liability,

2 There are, of course, other common varieties of multi-party 10b-5 litigation, such as customer "churning" suits against securities brokers and their brokerage firm employers. Moreover, certain groups of defendants, such as outside directors, can share some characteristics of both corporate insiders and outside advisors. Nevertheless, the statement in text is a useful generalization for purposes of discussion.

3 Attorneys and underwriters are among the other frequently-targeted outside advisors in 10b-5 actions.

4 As pointed out by Senator Sanford, there is no evidence that this increase in lawsuits corresponds to a similar increase in the incidence of securities fraud. To the contrary, the final outcome of all 10b-5 actions filed against the largest six accounting firms which concluded in 1991 shows that the total amount of settlements and judgments paid by the firms was only 3 percent of the claimed damages, and that in 83 percent of the cases the firms had to pay $8 in legal fees for every $1 ultimately paid to the plaintiffs. *See* 138 Cong. Rec. at S12605.

high insurance premiums and the increasing unavailability of insurance. *See, e.g.*, Gossman, *The Fallacy of Expanding Accountants' Liability*, 1 COLUM. BUS. L. REV. 213, 215, 228-31 (1988); Mednick, *Accountants' Liability: Coping with the Stampede to the Courtroom*, J. ACCT. 118 (Sept. 1987); Minow, *Accountants' Liability and the Litigation Explosion*, J. ACCT. 70 (Sept. 1984).[5]

In part, the rampant increase in litigation against accounting firms is due to the complexity of the certified public accountant's function and a pervasive misunderstanding of Generally Accepted Accounting Principles and Generally Accepted Auditing Standards that some commentators have called an "expectation gap": "a difference between what the public and financial statement users believe accountants and auditors are responsible for and what the accountants and auditors are responsible for and what the the accountants and auditors themselves believe they're responsible for." Guy & Sullivan, *The Expectation Gap Auditing Standards*, J. ACCT. 36 (Apr. 1988). A related but separate reason why auditors are frequently named as defendants is that, "[f]rom [the public misperception of the auditor's duties] flows an erroneous legal supposition that [the auditor's] responsibility should be coextensive with that of the client." Minow, J. ACCT. at 77-78.

In reality, an auditor is "a watch-dog, but not a bloodhound." *In re Kingston Cotton Mill Co.*, 2 Ch. 279, 288 (1896). As the California Supreme Court recently aptly stated:

> As a matter of commercial reality, audits are performed in a client-controlled environment. The client typically prepares its own financial statements; it has direct control over and assumes primary responsibility for their con-

5 In 1990, Laventhol & Horwath, the seventh-largest accounting firm, collapsed—the largest bankruptcy for a professional organization in United States history. While other factors contributed to the firm's demise, the overriding reason was the weight of its litigation burden. *See* McLeod, *Claims Help Sink Laventhol; Virtually All E & O Coverage Depleted*, BUS. INS., Nov. 26, 1990, at 2.

> tents. The client engages the auditor, pays for the audit, and communicates with audit personnel throughout the engagement. Because the auditor cannot in the time available become an expert in the client's business and record-keeping systems, the client necessarily furnishes the information base for the audit.
>
> * * *
>
> Thus, regardless of the efforts of the auditor, the client retains effective primary control of the financial reporting process.

Bily v. Arthur Young & Co., 834 P.2d 745 (Cal. 1992) (citations omitted).

Because the audit is a client-controlled process, an audit "primarily tests for unintentional mistakes, not fraud." Gossman, 1 COLUM. BUS. L. REV. at 236. In fact, an audit

> provides little or no protection against management fraud, which is designed to elude discovery. Managers who commit fraud are well aware of the procedures that are likely to be followed and their limitations, and are thus in a position to minimize the likelihood of discovery during an audit.

Id.; *see also id.* at 233 ("An audit report is not designed to guarantee the accuracy of the financial statements prepared by management, but only to attest to the fairness of management's presentation.").

Apart from the misunderstanding of their role in the financial reporting process, accountants are often sued simply because they are viewed by plaintiff investors as "convenient deep pocket[s]." *See* Lochner, *Black Days for Accounting Firms*, WALL ST. J., May 22, 1992, at A10, col. 4; Mednick, J. ACCT. 118 (Sept. 1987); Galen, *Litigation Blitz Hits Accountants*, NAT'L L.J., June 16, 1986, at 1, 26, col. 1. Accountants thus face liability distinctly out of proportion to their comparative responsibility, a circumstance which "dilutes the moral force of

the law and breeds cynicism on the part of those deep pockets who are targets." *Cf.* Wright, *Why Are Professionals Worried About RICO?*, 65 NOTRE DAME L. REV. 983, 994 (1990).

Moreover, accountants face a risk of liability under the securities laws vastly disproportionate to the compensation they receive. While it is not unusual for alleged losses of members in a securities class action to exceed several hundred million dollars, the typical auditing fee for the transaction giving rise to the litigation is but a tiny fraction of that potential exposure. *See, e.g.*, Berton, *Judge Voids Big Tort Award on Price's Audit*, WALL ST. J., Dec. 17, 1992, at A3, col. 4, A6, col. 3 (noting reversal of $338 million jury verdict against accounting firm, which was more than 2,000 times the firm's annual audit fee for its client bank). Meanwhile, the insider parties, such as corporate managers who have sold their stock in a public offering, often reap a disproportionate share of the benefits of the challenged transaction. To permit these parties to pay little or nothing, while requiring accountants and other advisors to shoulder the entire multi-million dollar liability, is especially unfair.

Finally, placing the bulk of responsibility for 10b-5 violations on accountants and other professionals unfairly harms the users of professional services. If professionals doing securities work face potential 100 percent exposure for their clients' misconduct, some professionals will stop practicing in the field, and the survivors will raise their rates to cover the increased risk. Ultimately, the investing public will be required to pay the cost.

As the Seventh Circuit recognized in *DiLeo v. Ernst & Young*, 901 F.2d 624 (7th Cir.), *cert. denied*, 111 S. Ct. 347 (1990), an overbroad extension of accountants' liability necessarily increases the costs of accounting services and thereby decreases the availability of these services. *Id.* at 629. Clients who are unable to afford the increased cost of high-quality accounting services may turn to accounting firms who are less responsible, but cheaper. *See* Kirby & Davies, *Accountant Liability: New Exposure for an Old Profession*, 36 S.D. L. REV. 576, 595 n.200 (1991).

In light of these equitable and practical considerations, the appropriateness of contribution in 10b-5 actions is beyond question. Yet opponents of contribution contend that it is not unfair to deny contribution in 10b-5 actions because liability presupposes a finding of intentional wrongdoing. *See, e.g.*, NASCAT Br. at 25-26. But that assumption does not hold where the party seeking contribution has settled before trial, which will be the case perhaps 90 percent or more of the time. *See* Point IC, *infra*. In that circumstance, there is neither a finding of liability nor, typically, any admission of wrongdoing by the settling party, who most often has settled simply to avoid the risk and cost of trial.

Moreover, even with respect to adjudicated wrongdoers, the lower federal courts have often permitted a finding of scienter predicated on something less than actual intent to defraud, such as recklessness. *See, e.g., Rolf v. Blythe, Eastman Dillon & Co.*, 570 F.2d 38, 44-47 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978).[6] And an adjudicated wrongdoer seeking contribution "is asserting a claim not based on the wrong, but upon the satisfaction of the wrong." Langmore & Prentice, 40 EMORY L.J. at 1068. Which defendant ultimately must pay to satisfy the wrong should be a matter of indifference to the plaintiff, in which case contribution should be allowed to prevent one defendant from having to carry an unjust burden.

Ultimately, a no-contribution rule violates the principle of equity that is a central goal of the American system of jurisprudence. No sound justification exists for abandoning this principle in actions brought under Rule 10b-5.

6 This Court has left open the question of whether recklessness or some other state of mind short of actual intent may suffice to establish scienter under Rule 10b-5. *See Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980).

B. Contribution Promotes the Policy of Deterrence.

For reasons similar to those supporting allowance of a right of contribution on grounds of fairness, the great majority of courts have concluded that a rule of contribution enhances the deterrent effect of the federal securities laws. *See, e.g., Gould v. American-Hawaiian Steamship Co.*, 387 F. Supp. 163, 169 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); *Baker v. B.P. America, Inc.*, 749 F. Supp. 840, 843 (N.D. Ohio 1990), *Globus, Inc. v. Law Research Serv., Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971). The reason is not difficult to discern: "Contribution tends to increase the diligence of potential defendants because each of them knows that he will be responsible for a portion of the damages, whether or not the defrauded investor names him in the lawsuit." 5D Jacobs, LITIGATION AND PRACTICE UNDER RULE 10b-5 § 264.02[c], at 11-442—11-443 (2d ed. 1992). Conversely, under a no-contribution rule, the "possibility of escaping all liability—a 'sporting chance' of a type traditionally appealing to wrongdoers as a class—might cause many to be more willing rather than less willing to engage in the wrongful activity." Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 133-34 (1932).

Indeed, for the same reason that courts have refused to allow indemnity in 10b-5 actions as a matter of public policy, they have permitted a cause of action for contribution. *See, e.g., Globus*, 318 F. Supp. at 958; *Gould*, 387 F. Supp. at 169. Were contribution not available, "those found liable for breach of a statutory obligation might escape liability as effectively as if they were entitled to indemnity." *Id.*

Petitioners argue that a no-contribution rule enhances deterrence because business managers are deterred by the risk of catastrophic loss and because contribution acts as a form of insurance. Pet. Br. at 40; NASCAT Br. at 16-18. But given the magnitude of potential damages in a 10b-5 class action, indi-

vidual corporate officers and directors are likely to view even shared liability as catastrophic. "Therefore, it is incorrect to assume that the smaller threat of a bigger penalty deters wrongful conduct more effectively than the more certain threat of a smaller penalty." Langmore & Prentice, 40 EMORY L.J. at 1080. To the contrary, "most courts and commentators have concluded that certainty of punishment is a more effective deterrent than severity of punishment, and therefore, that permitting contribution deters wrongdoing better than a no-contribution rule." *Id.* at 1074.

Even if it were provable that a no-contribution rule had a marginal deterrent impact in some circumstances—and no such proof exists—the impact of such a rule on the accounting profession would be minimal to non-existent. That is because accountants already face substantial penalties for improper conduct, the deterrent value of which dwarfs that of a no-contribution rule. Unlike most corporate insiders, accountants are "repeat players" in transactions creating potential 10b-5 liability, in connection with which they are regularly exposed to astronomical civil damages claims, potential government enforcement proceedings (both civil and criminal) and professional reputational injury.[7] These potential penalties far outweigh any benefits accountants stand to gain (such as receipt of their auditing fee) by participating in securities fraud.

Furthermore, unlike corporate insiders, accountants are subject to an extensive system of self-discipline and public oversight. For example, the Institute's bylaws require that firms auditing publicly-registered companies undergo a rigorous peer

7 The repetitive exposure to 10b-5 claims tends to be concentrated upon the six largest accounting firms, which collectively audit all but a handful of the country's largest and most prominent public companies. According to recently-published figures, the six firms audit 494 of the Fortune 500 industrial companies; 99 of the Fortune 100 largest commercial banks; and 90 percent of the publicly-traded companies in the United States with annual sales of one million dollars or more. *See* WHO AUDITS AMERICA 393-96 (Data Fin. Press, 25th ed. June 1991).

review process monitored by an autonomous Public Oversight Board ("POB") and overseen by the Securities and Exchange Commission ("SEC") through the Office of its Chief Accountant. Firms found to have engaged in flawed audits are required to undertake substantial corrective measures to improve their quality of practice. As a supplement to this peer review process, the Institute's Quality Control Inquiry Committee (QCIC), which is likewise overseen by the POB and SEC, reviews and analyzes all litigation and government proceedings alleging faulty audits of SEC registrants as well as banks and other financial institutions that file periodic regulatory reports with agencies other than the SEC. The Institute's members are required to report such litigation and proceedings to the QCIC, which then determines whether there are deficiencies in the firm's quality controls, and if so, whether the member has taken appropriate corrective measures.

In addition, accountants are governed by a Code of Professional Conduct administered by the Institute's Professional Ethics Division, which is empowered to investigate and take disciplinary action against members for violations of the Code. Accountants are also subject to discipline by state boards of accountancy, which enforce the state laws of public accountancy and impose penalties, up to and including revoking the professional's license to practice. And the SEC may bar an accountant from practicing before it if it finds that the accountant has engaged in "unethical or improper professional conduct." *See* 17 C.F.R. § 201.2(e)(ii).

Thus, accountants do not need a no-contribution rule to deter them from misconduct. By contrast, the specter of a contribution action may be a significant—and in some cases the only—deterrent to corporate insiders.

In the end, because the fairness factor runs so strongly in favor of a right to contribution, those who favor a no-contribution rule bear the heavy burden of persuasion on the question of whether such a rule would in fact operate as the greater deterrent in 10b-5 actions. Petitioners have failed to carry that burden here.

C. Contribution Does Not Discourage Settlement or Impair Judicial Efficiency.

The contention that contribution should be rejected because it discourages settlement and complicates litigation (NASCAT Br. at 18-24) is without merit. A soundly-administered contribution rule has none of the deleterious effects about which critics of the rule complain.

First, there is no convincing empirical evidence that a right of contribution discourages settlement. Langmore & Prentice, 40 EMORY L.J. at 1096. Indeed, disallowing contribution may actually discourage settlement because each defendant may refuse to settle in hopes that the plaintiff will seek recovery from the others. *Id.*

The notion that contribution inhibits settlement of 10b-5 actions is also refuted by experience. Contribution has been widely permitted in 10b-5 actions for many years, and the vast majority of such actions have in fact settled. *See* Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (concluding from empirical study that securities class action suits routinely settle for millions of dollars at a "going rate" of about 25% of the potential damages, regardless of the merits of the claims); Kennedy, *Securities Class and Derivative Actions in the United States District Court for the Northern District of Texas: An Empirical Study*, 14 HOUS. L. REV. 769, 811 (1977) (83% of federal securities actions which were tried, dismissed or settled over seven-year period were resolved by settlement); *see also* O'Brien, *The Class-Action Shakedown Racket*, WALL ST. J., Sept. 10, 1991, at A20, col. 3 (reporting 96% settlement rate); 138 Cong. Rec. E2463 (daily ed. Aug. 12, 1992) (statement of Rep. Tauzin on H.R. 5828, Securities Litigation and Civil Justice Preservation Act of 1992) ("In fact, 95 percent or more of all 10b-5 class actions are settled, much more than the normal settlement rate for other civil cases.").

The reason for this high settlement rate is simple: Under the current system, even innocent parties are forced to settle 10b-5 suits because it is often the only rational choice. *See Blue Chip Stamps*, 421 U.S. at 739 ("Litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general."). Defendants must face the fact that even if they ultimately prevail at trial, their legal expenses will be substantial. The burden of discovery falls disproportionately on defendants because they possess the bulk of the relevant information. *See Blue Chip Stamps*, 421 U.S. at 741 (noting potential for discovery process to permit a plaintiff with a largely groundless 10b-5 claim "to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence"). The risk of an enormous damage award, including the potential for punitive damages as well as treble damages on related RICO claims, must also be considered. And deep pocket defendants face the prospect of paying for the liability of other parties who settle for a disproportionately low amount.

While contribution does nothing to lessen the high overall settlement rate in 10b-5 actions, it does operate to prevent patently collusive settlements. A no-contribution rule creates an obvious incentive for plaintiffs to enter into collusive settlements with culpable, but financially strapped, corporate insiders in order to concentrate their efforts on deep pocket outside advisors who merely failed to discover the fraud. The insiders may settle for a minimal amount, secure in the knowledge that they face no further exposure for contribution, in exchange for an explicit or implicit promise to implicate their outside advisors in the alleged wrongdoing. The possibility of even more collusive "Mary Carter agreements," by which the settling defendant retains a financial stake in any recovery against the non-settling defendants, is also present. *See, e.g.*, *Elbaor v. Smith*, 36 Tex. Sup. Ct. J. 245 (Dec. 2, 1992) (declaring Mary Carter agreements void as against public policy).

Contribution thus assures that the most responsible parties will not be released from the action, at least not without payment of their fair share of any liability.

In *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 459 U.S. 375 (1983), the Fifth Circuit emphasized the anachronistic nature of a no-contribution rule in light of the "evolution of multiparty litigation involving class plaintiffs, numerous defendants, vast monetary claims, lengthy trials and enormous litigation costs." *Id.* at 558. As the court noted:

> Persons injured by the willful torts or deceit of others are entitled to full redress but should not be able to play one defendant against another as a gambit. Although the law favors compromise as a means of ending litigation, the type of settlement that is reached on the basis of the denial of contribution neither terminates the litigation nor furthers the goals of efficient court administration.

Id.

Similarly, in *Reliable Transfer*, this Court adopted a rule of contribution and rejected the argument that it should

> continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.

421 U.S. at 408.

Opponents of contribution also argue that contribution complicates litigation, thereby overburdening plaintiffs and the judicial system. *See* NASCAT Br. at 22-24. The short answer to this argument, as this Court has already stated, is that ease of administration does not justify an unfair rule. *Reliable Transfer*, 421 U.S. at 408. For example, while a comparative negligence rule arguably is more difficult to administer than a rule

of contributory negligence, that has not prevented the overwhelming majority of jurisdictions from adopting comparative negligence in tort cases. *See* Roszkowski & Prentice, *Reconciling Comparative Negligence and Strict Liability: A Public Policy Analysis*, 33 ST. LOUIS U. L.J. 19, 31-32 nn.58-60 (1988).

In any event, any asserted efficiencies of a no-contribution rule in 10b-5 actions would be minimal at best. Most Rule 10b-5 claims are coupled with pendent state law claims as to which rights of contribution already exist, and thus the court will have to resolve issues of damage apportionment among defendants anyway. The same is true when, as is frequently the case, a claim under Section 11 of the Securities Act, which permits contribution (*see* 15 U.S.C. §77k(f)) is brought together with a claim under Rule 10b-5. Moreover, the typical 10b-5 contribution claim is resolved among defendants and impleaded parties in the context of an already-existing action; in such cases, the contribution issues can be determined simply by submitting interrogatories to the jury, with little expenditure of additional time and effort. *See* Fed. R. Civ. P. 49.

II.

PROPORTIONAL FAULT IS THE BEST APPROACH TO THE ALLOCATION OF DAMAGES IN 10b-5 ACTIONS.

Although the question of how damages should be allocated among defendants seeking contribution is not before the Court, *amicus* NASCAT has urged the Court not to create a right of contribution without giving lower courts and litigants some guidance as to the contours of such a right. NASCAT Br. at 27. Without agreeing that the right of contribution need be fully defined at this juncture, the Institute offers the following views in the event the Court elects to consider the matter.

At least two separate questions are presented regarding the workings of a right of contribution: First, in contribution generally under Section 10(b), how is liability to be apportioned? And second, where some but not all defendants settle before trial, and further contribution claims against the settling defendants are barred, what method should be utilized for reducing the damages that may be collected from the remaining defendants? The Institute submits that with respect to both questions, a proportional or comparative fault method of apportionment is the best approach because it is most consistent with the policies behind the right of contribution.

First, with respect to the apportionment of liability generally between jointly liable parties who may seek contribution, a proportional fault approach is clearly superior to the other available alternative—the *pro rata* method. Under the *pro rata* method, damages are simply divided equally among all responsible parties, while the proportional fault approach allocates liability according to each party's percentage of fault as determined by the finder of fact.

This Court has already expressed its view that a proportional fault approach is preferable to a *pro rata* method of damage apportionment, stating in *Reliable Transfer* that "[a] rule that divides damages by degree of fault would seem better designed to induce care than the rule of equally divided damages, because it imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others." *See* 421 U.S. at 405 n.11. The lower courts have also overwhelmingly rejected the *pro rata* approach because of the unfairness inherent in automatically apportioning damages evenly among persons found liable, particularly in 10b-5 actions where there are numerous parties with varying degrees of culpability, some of whom are only remotely involved in the alleged fraud. *See Gould*, 387 F. Supp. at 171; *Smith v. Mulvaney*, 827 F.2d 558, 561 (9th Cir. 1987); *McLean v. Alexander*, 449 F. Supp. 1251, 1273 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979) (*pro rata* rule is "characterized by more mathematical than judicial integrity.").

The artificial nature of the *pro rata* rule also makes it more difficult for a plaintiff to settle cases involving multiple defendants with widely varying culpability. *See* Adamski, 66 IOWA L. REV. at 560. Minimally culpable defendants are unlikely to settle for as much as an amount based on their *pro rata* share of total damages, while major defendants are unlikely to be willing to pay more than their *pro rata* share.

Thus, if the Court is inclined to reach the question, it should define the 10b-5 right of contribution to include the proportional fault method of apportionment, consistent with the Court's statement in *Reliable Transfer* that comparative fault should be the rule "whenever possible." 421 U.S. at 411.

As for the second and related question of how the plaintiff's damages should be reduced at trial following a partial settlement, the debate is essentially between a *pro tanto* approach, under which any judgment against non-settling defendants is reduced by the dollar amount of the settlement, and the proportional fault or "*Kaypro*" approach, so named after the decision in *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir.), *cert. denied*, 111 S. Ct. 232 (1990). Again, the proportional fault method is clearly the better approach. *See* Langmore & Prentice, 40 EMORY L.J. at 1098; *accord* Wolff, *Allocation of Damages Under the Federal Securities Laws*, 60 WASH. U. L.Q. 211, 245-46 (1982); *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540 (D. Colo. 1989), *appeal dismissed as moot*, 936 F.2d 582 (10th Cir. 1991).

In many 10b-5 actions, a *pro tanto* approach is virtually tantamount to a rule of no-contribution at all. For example, assume that in a shareholder class action the plaintiff's loss is $100 million and the former corporate officers and directors are responsible for 70 percent of that loss but collectively settle for only $1 million. Assume further that the corporation's outside accountants and lawyers are each 15 percent responsible. After settlement, the accountants and lawyers may have to make up the remaining $99 million even though, under equitable principles, their fair share would be only $30 million collectively.

The *pro tanto* reduction of $1 million has the same practical effect in such a situation as no contribution at all.

The *pro tanto* rule also retains the same dangers of collusion that are present in a no-contribution system. Since the plaintiffs will be able to collect their total loss, less the settlement amount, from the remaining defendants, they have nothing to lose by accepting an inadequate settlement from more culpable, but less solvent, parties who can be enlisted to help "go after" the deep pockets. *See River Garden Farms, Inc. v. Superior Court*, 103 Cal. Rptr. 498, 503 (Ct. App. 1972) ("In a multi-party case, the threat of an unshared judgment against the last remaining defendant—diminished only by meager settlements with his eager fellows—permits a plaintiff to create acute financial pressures bordering on extortion."); *Kaypro*, 884 F.2d at 1230 (under *pro tanto* scheme "plaintiffs could effect low settlements with defendants who had limited resources, and thereby *force* wealthier defendants to pay more than if all parties proceeded to trial") (emphasis in original). For the same reason, a *pro tanto* rule potentially diminishes the deterrent effect of the securities laws by allowing the primary wrongdoer to escape with a minimal settlement payment. *See* Adamski, 66 IOWA L. REV. at 551.

In theory, these dangers can be minimized by requiring the court to determine that the partial settlement was fair and in good faith. *See, e.g., Nelson v. Bennett*, 662 F. Supp. 1324, 1338-39 (E.D. Cal. 1987). But since a good faith hearing generally takes place far in advance of trial, and before the evidence is heard, the court cannot determine that the settlement, even if made in good faith, will not prejudice the non-settling parties by requiring them to pay a far greater share of the judgment than would have been required if all defendants went to trial. Adamski, 66 IOWA L. REV. at 550; *Kaypro*, 884 F.2d at 1230. And by requiring a good faith hearing—which is unnecessary to protect non-settling defendants under the proportional fault rule—the alleged efficiencies of the *pro tanto* rule are largely dissipated. *See id.*; *Alvarado Partners*, 723 F. Supp. at

553. In sum, "[t]he encouragement of settlements achieved by the *pro tanto* approach thus comes at too high a cost to the principles of fairness in the apportionment of damages intended to be furthered by recognition of a right to contribution." Adamski, at 551; *see Reliable Transfer*, 421 U.S. at 408.

Under the proportional fault approach, non-settling defendants are barred from further rights of contribution from the settling defendants. At trial,

> the jury is asked not only to determine the total dollar damage amount, but also the percentage of culpability of each of the nonsettling defendants as well as that of the settling defendants. Nonsettling defendants as a whole will then be required to pay the percentage of the total amount for which they are responsible. The nonsettling defendants will be jointly and severally liable for that percentage, and will continue to have rights of contribution against one another.

Kaypro, 884 F.2d at 1231. The *Kaypro* rule thus satisfies the deterrent goal of punishing each wrongdoer, ensures that the equitable goal of contribution will be met, and encourages settlements by assuring that settling defendants will not be exposed to further risk. *Id.* It also removes the possibility of collusion since it is unlikely that a plaintiff will intentionally make an inadequate settlement with a highly culpable wrongdoer, knowing that any judgment against the remaining defendants may be reduced by the percentage liability of the settling wrongdoer.

The principal objection to the *Kaypro* rule advanced by its opponents is that plaintiffs supposedly "forfeit their right to be made whole when liability is established after trial." NASCAT Br. at 18. This is untrue. Any diminution of the judgment under the *Kaypro* approach is due entirely to plaintiff's voluntary decision to settle for an amount that proves to be inadequate. What *Kaypro's* critics really are complaining about is that the proportional fault approach places the risk of an inadequate settlement upon the plaintiff rather than the non-settling defen-

dants. *See* Davis, *Multiple Defendant Settlement in 10b-5: Good Faith Contribution Bar*, 40 HASTINGS L.J. 1253, 1276 (1989); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 161 (4th Cir. 1991) ("[P]laintiffs bear the risk of a 'bad' settlement under the 'proportionate' rule, while under the '*pro tanto*' rule the risk passes to the non-settling defendants. . . ."). Yet it is not unfair to place this risk on the plaintiff, since it is the plaintiff, after all, who has chosen to settle for an amount deemed to be in its best interests. If plaintiff chooses to settle cheaply to avoid the uncertainties and costs of litigation against a particular defendant, or to obtain a "war chest" to fund the litigation, that is plaintiff's choice. But non-settling defendants, who are not parties to this private bargain, should not be required to bear the risk that plaintiff's choice will later prove unsatisfactory. *See Alvarado Partners*, 723 F. Supp. at 553.

The assertion that the *Kaypro* rule necessarily prevents plaintiffs from being made whole also ignores the possibility that a plaintiff under this rule actually may end up receiving more in the aggregate than it would have if all defendants had gone to trial. This will be the case whenever the settling defendants pay a sum exceeding their proportional share as determined at trial.[8]

Critics of the *Kaypro* rule also complain that it provides non-settling defendants an "empty chair" defense which results in lower judgments. Pet Br. at 39; NASCAT Br. at 22. But this "defense" is a double-edged sword. Securities class action plaintiffs typically allege, and seek to prove, a common conspiracy or scheme to defraud in which all defendants partici-

8 To prevent such a windfall, and avoid violation of the "one satisfaction" rule (by which the plaintiff is not entitled to receive double compensation for the same injury), the optimum contribution bar rule is a "capped" comparative fault approach which reduces the judgment by the settlement amount or the settling defendants' percentage of fault, whichever is greater. *See First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.*, 631 F. Supp. 1029 (S.D.N.Y. 1986) (applying N.Y. Gen. Oblig. L. § 15-108); Davis, 40 HASTINGS L.J. at 1276-78.

pated. If non-settling defendants engage in too much finger pointing at the absent "ringleader" (NASCAT Br. at 22), they only end up implicating themselves and increasing the odds of a plaintiff's verdict. Nor is plaintiffs' counsel forced to defend the conduct of the settling defendants (NASCAT Br. at 28); plaintiff's first and foremost incentive remains to establish liability on the part of the defendants at trial, which is usually best accomplished by asserting that they were participants in a common scheme to defraud. If anything, proof of this scheme is easier when the settling defendants are no longer present to deny wrongdoing. With the settling defendants gone from the scene, plaintiff can train his sights on the remaining defendants and sharpen the focus of the trial to emphasize their alleged misdeeds. For example, if only underwriter defendants are remaining, plaintiff's counsel can put on a case of underwriters' liability without having to expend time and limited attorney resources trying to prove a case against accountants, attorneys or individual managers, each of whom would have had separate and vigorous representation at trial. Meanwhile, under this example, the underwriter defendant will lose the benefits of a unified front that would have been present had all defendants gone to trial. These benefits include the potential value-added by other defense counsel who may be more experienced or better prepared for trial, particularly on certain aspects of the defense case.

NASCAT also argues that *Kaypro* effectively precludes partial settlements, particularly with less solvent parties, by making them too costly for plaintiffs to bear. NASCAT Br. at 20. Putting aside the unreality of the hypothesis that any defendant would ever be willing to pay "everything they own in settlement," *id.* at 22 (why do so, when one could do no worse, and possibly much better, by going to trial?), the argument lacks any merit. The short answer to this argument is that the *Kaypro* rule inhibits only settlements that are unfair to non-settling defendants, and it is no indictment of the rule to say that it produces this result. Beyond this, non-settling defendants still have a strong incentive to settle after a partial settlement has

been achieved, since no defendant wishes to become the sole focus of the plaintiff's case (and the jury's attention) at trial. Once plaintiff starts the ball rolling by settling with some but not all defendants, that increases the pressure on non-settling defendants to fall in line and reach a global settlement.

Moreover, the contention that *Kaypro* precludes settlements is demonstrably untrue. In the Ninth Circuit, which follows the *Kaypro* rule, both global and partial settlements continue to be achieved with regularity. *See, e.g., In re U.S. Grant Hotel Assoc. Ltd. Sec. Litig.*, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,703 (S.D. Cal. Nov. 6, 1990) (reporting approval of partial settlement); *In re Precious Metals Dealers Litig.*, No. 90-5124 (C.D. Cal. Feb. 24, 1992) (partial settlement reported in 15 Class Action Rep. 145 (1992)); *In re Rykoff-Sexton Sec. Litig.*, No. 90-0689 (C.D. Cal. Nov. 13, 1991) (settlement reported in 15 Class Action Rep. 145 (1992)); *In re Xoma Corp. Sec. Litig.*, Nos. 92-2252 & 92-0687 (N.D. Cal. May, 20 1992) (settlement reported in 15 Class Action Rep. 147 (1992)); *In re Brichard Sec. Litig.*, No. 87-2987 (N.D. Cal. Mar. 27, 1991) (partial settlement reported in 15 Class Action Rep. 152 (1992)); *Berley v. Sculley*, No. 91-20270 (N.D. Cal. Feb. 27, 1992) (settlement reported in 15 Class Action Rep. 153 (1992)); *Arata v. Nu Skin Int'l, Inc.*, No. 91-2811 (N.D. Cal. Jan. 31, 1992) (settlement reported in 15 Class Action Rep. 158 (1992)); *Alfus v. Pyramid Tech. Corp.*, No. 89-20184 (N.D. Cal. Feb. 20, 1991) (settlement reported in 14 Class Action Rep. 525-26 (1991)); *In re Cineplex Shareholders Litig.*, No. 89-2461 (C.D. Cal. 1991) (settlement reported in 14 Class Action Rep. 526 (1991)); *In re Beverly Hills Sav. & Loan Ass'n Sec. Litig.*, No. 85-3157 (C.D. Cal. June 13, 1991) (settlement reported in 14 Class Action Rep. 314 (1991));[9] *In re Technical Equities Fed. Sec. Litig.*, No. C-

9 The *Beverly Hills* case illustrates how a case can settle partially, and then globally, under the *Kaypro* rule. Subsequent to a partial settlement between the plaintiffs and the officer and director defendants, a global resolution of the litigation was reached to include the underwriter, law firm and accounting firm defendants.

86-20157 (N.D. Cal. Nov. 17, 1989) (settlement reported in 14 Class Action Rep. 315-16 (1991)); *Tonnemacher v. Sasak*, No. 89-0201 (D. Ariz. Apr. 15, 1991) (partial settlement reported in 14 Class Action Rep. 316 (1991)); *In re Digital Sound Corp. Sec. Litig.*, No. 90-3533 (C.D. Cal. Jan. 31, 1991) (settlement reported in 14 Class Action Rep. 330 (1991)).[10]

Furthermore, the asserted efficiencies of a *pro tanto* contribution bar rule, in comparison with a rule of relative culpability, are uncertain at best. Unlike the *pro tanto* rule, the *Kaypro* approach does not require a separate hearing to determine the fairness and good faith of a partial settlement, since a proportional fault rule adequately protects non-settling defendants from collusive or inadequate settlements. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 160 & n.3 (4th Cir. 1991). The good faith hearing, if it is to serve its intended purpose, " 'means bogging down the settlement process in a miniature trial before trial.' " *Kaypro*, 884 F.2d at 1230 (quoting *Donovan v. Robbins*, 752 F.2d 1170, 1181 (7th Cir. 1985)). That would negate many of the benefits of settlement. 884 F.2d at 1230.[11]

10 Indeed, in *Kaypro* itself, the original non-settling defendants were able to agree to a global settlement within a short time after finalization of the Ninth Circuit's decision without additional discovery. After the company's officers and directors had originally settled for approximately $9.25 million, the remaining accountant and underwriter defendants settled for $300,000 each—a settlement that would not have been possible under a *pro tanto* regime.

11 It may be argued that in a securities class action, the court will be required to conduct a fairness hearing anyway pursuant to Fed. R. Civ. P. 23(e), even under the proportional fault rule. But such a hearing need not concern itself with the relative fault of the wrongdoers or the evidence necessary to make that determination. *See In re Jiffy Lube*, 927 F.2d at 160 ("A separate hearing on fairness from the perspective of the non-settling defendant is not required unless the district court chooses to adopt the '*pro tanto*' method of setoff."); *Smith v. Mulvaney*, 827 F.2d at 562 (describing different nature of the two proceedings). Moreover, in non-class action 10b-5 cases, no fairness hearing at all would take place under the proportional fault approach.

In sum, the claimed efficiencies of the *pro tanto* rule are at best marginal, and in any event do not outweigh the other clear advantages of the proportional fault rule. Consistent with the rationale for the right of contribution itself, the proportional fault rule serves the goal of fairness, promotes the policy of deterrence, and encourages appropriate settlements of actions.

CONCLUSION

For all of the foregoing reasons, the Court should recognize a right to contribution under Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder.

Dated: December 31, 1992

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In the Supreme Court of the United States

OCTOBER TERM, 1992

MUSICK, PEELER & GARRETT, ET AL., PETITIONERS

v.

EMPLOYERS INSURANCE OF WAUSAU, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE FIRST BOSTON CORPORATION, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, MORGAN STANLEY & CO. INCORPORATED, SHEARSON LEHMAN BROTHERS, INC. AND SALOMON BROTHERS INC AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether this Court should reverse the longstanding rule that contribution is available under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 as promulgated by the Securities and Exchange Commission?

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-34

MUSICK, PEELER & GARRETT, ET AL., PETITIONERS

v.

EMPLOYERS INSURANCE OF WAUSAU, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE FIRST BOSTON CORPORATION, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, MORGAN STANLEY & CO. INCORPORATED, SHEARSON LEHMAN BROTHERS, INC. AND SALOMON BROTHERS INC AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

With the consent of the parties pursuant to Rule 37 of the Rules of this Court, the amici curiae submit this brief in support of respondents.

As leading investment banking firms, amici are involved in every facet of the securities marketplace—from

underwriting securities offerings, to selling and purchasing securities, to advising on securities issues and other securities transactions. Because of this participation, amici have a strong interest in the rules governing federal securities law litigation. The longstanding contribution rule under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, has resulted in a rational and equitable allocation of risks among participants in the capital markets. Because abolition of the rule would substantially affect amici, their views may be of substantial assistance to the Court's consideration of this case.

SUMMARY OF ARGUMENT

This Court has held that "a right to contribution may arise in either of two ways: first, through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or, second, through the power of federal courts to fashion a federal common law of contribution." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981). The contribution rule under Section 10(b) meets both of these tests.

Given that Congress did not even contemplate a right of action under Section 10(b), it obviously did not expressly articulate its intent with respect to a right to contribution under that provision. This Court, however, has looked to analogous provisions of the securities laws of which Section 10(b) is a part in interpreting that section. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773, 2780 (1991). Congress's provision of contribution in *every* express analogue to Section 10(b) in the securities acts demonstrates that Congress intended to couple joint and several securities law liability with a right to contribution. A right to contribution under Section 10(b) arises by "clear implication" from these unambiguous choices Congress made in every comparable provision of the securities laws.

Irrespective of whether Congress expressly articulated or clearly implied such a right, this Court also should endorse contribution under Section 10(b) as a matter of federal common law. Because the cause of action under Section 10(b) is a product of judicial, rather than legislative creation, its integral attributes must be analyzed under the same common law standards employed to create the action in the first instance. Accordingly, this Court has long interpreted the scope of the Section 10(b) action under flexible, policy-based, common law principles. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737 (1975). Those principles strongly favor contribution.

In addition to the legislative policy evidenced in every express counterpart of Section 10(b), historical and policy considerations support contribution. For the past twenty-five years, securities litigants have relied upon, and adapted to, the contribution rule under Section 10(b). Reversal of this status quo would interfere with the comprehensive and cohesive scheme of securities laws that has been in place for decades.

Moreover, a new rule barring contribution would result in the inequitable allocation of damages under Section 10(b). Plaintiffs could threaten lesser and secondary actors with liability for amounts wholly disproportionate to their degree of wrongdoing. Not only would this be inherently inequitable, but it would conflict with the fairness choice Congress made in providing contribution for every express securities action that closely resembles Section 10(b). By empowering securities plaintiffs to isolate and threaten selected defendants with full responsibility for theoretically massive damage claims, a rule of no contribution would also enhance the power of plaintiffs to coerce defendants into inequitable settlements.

The universal experience of the federal courts over the past two decades demonstrates that the contribution rule is easily manageable; it has led neither to undue complexity in securities proceedings nor reduced settlements of securities actions. To the contrary, it has enhanced enforcement of the securities laws by ensuring that the deterrent effect of those laws is borne by all wrongdoers, rather than merely those defendants whom plaintiffs, for their own tactical purposes, may choose to sue. Concerns about application of the rule provide no legitimate basis to turn back the clock twenty-five years, rearrange the dynamics of the securities enforcement arena, and ignore Congress's clear legislative choice on this matter.

ARGUMENT

This Court has held that there are two independent bases for recognizing a right to contribution under a federal cause of action: (1) "the affirmative creation" of the right by Congress "either expressly or by clear implication"; and (2) "the power of federal courts to fashion a federal common law of contribution." *Texas Industries*, 451 U.S. at 638. With respect to Section 10(b), both of these alternative tests are met. First, the statutory structure of the securities laws clearly evidences a congressional intent to allow contribution for securities fraud actions similar to the Section 10(b) action. Second, the federal common law principles that have traditionally governed Section 10(b) jurisprudence also favor a right to contribution. Whether utilizing a narow analytical approach based solely on congressional intent, or a more expansive, common law-based standard that looks both to the statutory scheme and to relevant historical and policy considerations, this Court should recognize a right to contribution under Section 10(b).

I. THE SECURITIES LAWS CLEARLY IMPLICATE A RULE OF CONTRIBUTION UNDER SECTION 10(b)

As noted, this Court has held that a right to contribution may arise if Congress created such a right "either expressly or by clear implication." *Texas Industries*, 451 U.S. at 638. When an underlying private right of action (such as that implied under Section 10(b)) is not created by Congress in the first instance, "it is to be expected" that Congress "will typically be equally silent or ambiguous on the question" of a right of contribution. *Northwest Airlines, Inc.* v. *Transport Workers Union*, 541 U.S. 77, 94 (1981) (quotation omitted). In such circumstances, the Court must look beyond the narrow, implied statutory provision at issue for evidence of congressional intent, and turn for guidance to the entire statute and statutory scheme of which it is a part. "[C]ongressional intent can be inferred from the language of the statute, the statutory structure, or some other source." *Ibid.*

Understandably, the Court has followed this same approach in interpreting Section 10(b) and Rule 10b-5; for it is now well recognized that the implied right of action created thereunder is unique in the Court's jurisprudence. This Court has not indulged in the fiction that congressional intent can be fathomed with reference to Section 10(b) standing alone.[1] Instead, "faced with the awkward task of discerning [what] Congress intended [with respect to] a cause of action it really never knew existed," *Lampf*, 111 S. Ct. at 2780, the Court has looked to "the statute [and] statutory structure," of which Section 10(b) is a part—that is, the 1934 Securities Exchange Act and its related contemporaneous statute, the 1933

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[1] See *Lampf*, 111 S. Ct. at 2780 ("we have made no pretense that it was Congress' design to provide the remedy afforded"); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 196 (1976) ("[T]here is no indication that Congress, or the Commission when adopting Rule 10b-5, contemplated such a remedy.") (footnotes omitted).

Securities Act, 15 U.S.C. § 77 *et seq.* "The 1933 and 1934 Acts constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst*, 425 U.S. at 206. "We can imagine no clearer indication of how Congress would have balanced the policy considerations * * * than the balance struck by the same Congress in limiting similar and related protections." *Lampf*, 111 S. Ct. at 2780.[2]

In this instance, Congress's design throughout the 1933 and 1934 Acts is plain. In enacting express remedial provisions under those two statutes, Congress uniformly provided that the imposition of joint and several liability against multiple defendants should be paired with the right to contribution. As Professor Loss succinctly stated: "Those civil liability provisions of the 1933 and 1934 Acts that contemplate more than one defendant *do* contain provisions on contribution." L. Loss, *Fundamentals of Securities Regulation* 1036 (1988) (emphasis added).

Specifically, Congress expressly conferred a right to contribution for actions brought under Sections 9 and 18 of the Exchange Act (see 15 U.S.C. §§ 78i(e), 78r(b)), as well as Section 11 of the Securities Act (see 15 U.S.C. § 77k(f)).[3] This congressional action is highly probative

[2] See also *Kamen* v. *Kemper Financial Services*, 111 S. Ct. 1711, 1717 (1991) ("Our cases indicate that a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules * * * when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand."); *Blue Chip Stamps*, 421 U.S. at 736 (in defining the plaintiff class under Section 10(b), the Court relied on the bounds Congress "delineated for comparable express causes of action"); *Basic Inc.* v. *Levinson*, 485 U.S. 224, 257 (1988) ("In the past, the scant legislative history of § 10(b) has led us to look at Congress' intent in adopting other portions of the Securities Act when we endeavor to discern the limits of private causes of action under Rule 10b-5.") (White, J., joined by O'Connor, J., concurring in part and dissenting in part) (citing *Ernst & Ernst*, 425 U.S. at 204-206).

[3] Congress's deliberativeness in coupling joint and several liability with contribution is noteworthy. Unlike today, when almost all jurisdictions favor contribution among joint tortfeasors (see p. 18 n.19, *infra*), the rule was to the contrary in the 1930's. Accordingly, Congress provided in the 1933 and 1934 Acts that contribution shall be recognized as if allowed under principles of "contract." See Loss, *supra*, at 1036.

given that this Court has repeatedly highlighted those statutory sections, particularly Sections 9 and 18, as close analogues to Section 10(b).[4] As this Court explained in *Lampf*,

> [Sections 9 and 18] target the precise dangers that are the focus of § 10(b). Each is an integral element of a complex web of regulations. Each was intended to facilitate a central goal: 'to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges.'

111 S. Ct. at 2781 (quoting *Ernst & Ernst*, 425 U.S. at 195).[5] Significantly, like Section 10(b), Sections 9 and

[4] Section 10(b) prohibits the use of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security. Similarly, Sections 9(e) and 18(a) of the same Exchange Act, respectively, provide causes of action on behalf of persons damaged by manipulation of the securities markets and by misleading statements in documents filed with the SEC. Section 11(a) of the Securities Act grants a cause of action to persons who purchase securities issued pursuant to a false or misleading registration statement.

[5] See also *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 45 (1977) (noting "the close relationship" between the anti-manipulation provision of Rule 10b-6, also promulgated under § 10(b), and § 9); *Basic Inc.*, 485 U.S. at 257-58 (looking to § 18 in interpreting the scope of § 10(b)) (White, J., joined by O'Connor, J., concurring in part and dissenting in part); *In re Data Access Systems Securities Litigation*, 843 F.2d 1537, 1548 (3d Cir. 1988), cert. denied, 488 U.S. 849 (1988) (noting that §§ 9 and 18 are "aimed at the same objectives" as § 10(b) and "aim to compensate the same type of injury"); *Ceres Partners* v. *GEL Associates*, 918 F.2d 349,

18 of the Exchange Act require more than mere negligence (*Ernst & Ernst*, 425 U.S. at 209 n.28), and thus allow defendants who are found to have acted with scienter to obtain contribution.[6] Accordingly, the provision of contribution for Section 10(b)'s counterparts "clearly implies" that Congress intended contribution to be available for actions impliedly brought under Section 10(b).[7]

Indeed, the few statutory provisions of the securities laws that do not expressly establish a right to contribution only confirm the conclusion that Congress intended contribution to be available for actions that "contemplate multiple defendants." Loss, *supra*, at 1017. Section 12 of the Securities Act, 15 U.S.C. § 77*l*, and Section 16 of the Exchange Act, 15 U.S.C. § 78p, both differ markedly from Sections 9, 11, and 18, as well as Section 10(b). Unlike the latter sections, which impose broad joint and several liability on all participants in a securities transaction, Sections 12 and 16 provide for narrowly targeted rescission and disgorgement remedies. Neither provision, historically or today, imposes broad-based codefendant liability. The failure of Congress to

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361-62 (2d Cir. 1990) (noting that §§ 9 and 18 "are closely related" to and "substantially overlap" § 10(b) and that a § 9 action "could as easily be brought under Rule 10b-5"; court also acknowledged the "permissible overlap between actions under § 10(b) and those under § 11 of the 1933 Act").

[6] Section 11 similarly allows intentional violators to obtain contribution from similarly situated defendants. The only limitation is that Section 11 precludes contribution in favor of a party liable for fraud from a party innocent of fraud. See 15 U.S.C. § 77k(f). This limitation has no bearing on Section 10(b), however, because that provision imposes liability only on defendants who acted with scienter.

[7] Thus, contrary to petitioners' suggestion (Br. 19-20), there *is* evidence that Congress "intended to benefit wrongdoers" under the securities laws by providing them with a right to contribution.

incorporate a contribution provision in these sections is thus of no significance to the contribution issue under Section 10(b).

Section 12, for example, expressly imposes liability for rescission on a person who sells a security in violation of that section "to the person purchasing such security from *him*." 15 U.S.C. § 77*l* (emphasis added). The applicability of this provision to more than one defendant has been settled (specifically under Section 12(1)) only recently, by this Court's decision in *Pinter v. Dahl*, 486 U.S. 622 (1988). In contrast to Sections 9, 11, and 18—which facially contemplate broad liability on the part of multiple defendants—the language of Section 12 "contemplates a buyer-seller relationship not unlike traditional contractual privity." *Id.* at 642.[8] Given

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[8] Because the common law had traditionally permitted rescission only between contracting parties, there was considerable support prior to this Court's decision in *Pinter* v. *Dahl* for the proposition that Congress intended to limit defendants under Section 12 to the immediate party who actually transferred title. See Abrams, *The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials*, 15 Ford. Urb. L.J. 877, 924 (1987). Indeed, prior to *Pinter*, many lower courts had held that Section 12 required such strict privity. See, *e.g.*, *Sanders* v. *John Nuveen & Co.*, 619 F.2d 1222, 1226 (7th Cir. 1980); *Benoay* v. *Decker*, 517 F. Supp. 490, 494 (E.D. Mich. 1981), aff'd mem., 735 F.2d 1363 (6th Cir. 1984); *American Bank & Trust Co.* v. *Joste*, 323 F. Supp. 843, 846 (W.D. La. 1970). Although *Pinter* expanded the scope of defendants under Section 12(1) beyond persons who actually passed title to include other statutory sellers who successfully solicited a securities purchase, the Court nevertheless emphasized the limited class of statutory defendants and the restricted nature of the rescissionary remedy under Section 12. 486 U.S. at 650 n.26. Specifically, it emphasized that Section 12 does not impose general codefendant liability on all participants in a securities transaction. *Ibid.* Other courts since *Pinter* have also emphasized the narrow scope of Section 12. See, *e.g.*, *Wilson* v. *Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1127 (2d Cir. 1989) (following amicus brief of SEC, court rejected any analogy to Section 10(b) and denied collateral or aiding and abetting liability under Section 12).

this focus, Congress no doubt thought it unnecessary to confer a right to contribution for the action authorized under Section 12. See 5D A. Jacobs, *Litigation & Practice Under Rule 10b-5* § 264.02[c], at 11-443 n.14 (Callaghan 1992) ("While liability can now be imposed on a number of defendants under Section 12 of the Securities Act * * *, Congress probably did not include a provision relating to contribution in that section since the legislators conceived that only one person would be sued.").

Congress likewise had no reason to establish an express right to contribution under Section 16(b) of the Exchange Act. Again unlike Section 10(b) or its counterparts, Sections 9, 11, and 18, Section 16(b) does not provide for broad codefendant liability; it creates a special prophylactic rule calling for the disgorgement of short-swing trading profits in proscribed circumstances, irrespective of any wrongful intent. Damages are limited to the trader's specific profit; moreover, the section facially contemplates recapturing those profits only from the beneficial owner of the securities who benefitted from the trading (profits "realized by him").[9] Not surprisingly, this Court has summarily dismissed the suggestion that Section 16(b) might serve as an apt analogy for Section 10(b)—noting instead that it fundamentally "differs in focus from § 10(b) and from the other express causes of action [such as §§ 9 and 18 in the 1934 Act]." *Lampf*, 111 S. Ct. at 2780 n.5. It follows that as with Section 12, the absence of contribution in this section has no bearing on the issue of contribution under Section 10(b).[10]

[9] See *Baker* v. *BP America, Inc.*, 749 F. Supp. 840, 842-43 n.1 (N.D. Ohio 1990) ("The language of §§ 12(1) and 12(2) * * * and § 16(b) * * * suggests that Congress envisioned only a single defendant for cases brought under those sections.").

[10] The only other liability provision of the securities laws that does not specifically confer a right to contribution is the new insider trading provision in Section 20A, 15 U.S.C. § 78t-1. This Court recently has made clear, however, that, for purposes of interpreting Section 10(b), the contemporaneously enacted provisions of Sections 9 and 18 are the appropriate analogies and not Section 20A, enacted five decades later. See *Lampf*, 111 S. Ct. at 2781. Moreover, liability under Section 20A is limited to the profits made or loss avoided through insider trading. See 15 U.S.C. § 78t-1(b)(1). Thus, the provision is more like the disgorgement and rescission remedies of Sections 16(b) and 12 than the expansive damages remedies of Sections 9, 11, 18, and 10(b).

Similarly irrelevant is the absence of an express right to contribution under Section 15 of the Securities Act and Section 20(a) of the Exchange Act. Those provisions hold that controlling persons shall be liable "to the same extent as" the persons controlled by them. See 15 U.S.C. §§ 77*o*, 78t(a). They are thus derivative of and incorporate the underlying substantive provisions of the securities acts. If the substantive provision under which a controlling person is found liable provides for contribution, the controlling person is allowed to exercise that right as well.[11]

In short, both the "language of the [express provisions of the 1933 and 1934] statute[s] [and] the statutory structure" (*Northwest Airlines*, 451 U.S. at 94), demonstrate that, for every express cause of action of the securities laws that contemplates joint and several liability, Congress uniformly chose a bittersweet path—pairing the express liability with an entitlement to con-

[11] See Loss, *supra* at 1036 n.131 (although Section 11's contribution provision "does not literally cover controlling persons liable under § 15, they nevertheless fall within the scope of § 11(f) because § 15 specifies the same *prima facie* liability as § 11"); *Laventhol, Krekstein, Horwath & Horwath* v. *Horwitch*, 637 F.2d 672, 675 (9th Cir. 1980), cert. denied, 452 U.S. 963 (1981) (§ 15 controlling persons liable under § 11 are subject to § 11's contribution provision); M. Kaufman, *Securities Litigation: Damages* § 10:4, at 11 (Callaghan 1989) ("Controlling persons are liable to injured plaintiffs 'to the same extent' as are the primary violators. Liability is joint and several, making the principal liable for the full amount of the plaintiff's damages. Controlling persons may seek indemnification and contribution from their agents, provided that the agent's pockets are deep enough.") (footnote omitted).

tribution. From the standpoint of putative defendants under Section 10(b), petitioners wish to retain the bitter and to discard the sweet. Such a position is inconsistent with the "clear implication" of the securities acts crafted by Congress and should be rejected by this Court.

II. THIS COURT SHOULD RECOGNIZE A RIGHT OF CONTRIBUTION UNDER SECTION 10(b) AS A MATTER OF FEDERAL COMMON LAW

In addition to finding that a right to contribution under Section 10(b) is clearly implied by the securities laws, this Court should also recognize that right as a matter of federal common law. As stated in *Texas Industries*, "[i]n areas where federal common law applies, the creation of a right to contribution may fall within the power of the federal courts." 451 U.S. at 641. Section 10(b) is just such an area, and this Court can and should exercise that power to endorse a right to contribution under that provision.

A. Section 10(b) Is An "Area[] Where Federal Common Law Applies"

It is by now settled that Section 10(b) is a "nontraditional" provision (*Lampf*, 111 S. Ct. at 2779), and, as such, an "area[] where federal common law applies" (*Texas Industries*, 451 U.S. at 641). Time and again, this Court has stated that, in light of the absence of congressional intent respecting Section 10(b), the implied cause of action created thereunder cannot meaningfully be justified or analyzed under strict modern intent-based standards. See p. 5 & n.1, *supra*. Thus, federal courts recognize and give shape to the implied right of action under Section 10(b) by application of common law principles, as informed by historical practice and issues of policy. As this Court explained in *Blue Chip Stamps*, "[w]hen we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little

more than a legislative acorn. * * * It is therefore proper that we consider * * * what may be described as policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance." 421 U.S. at 737.[12]

Indeed, the common law authority of federal courts to fill gaps in the federal securities laws was reaffirmed two terms ago in *Kamen*, 111 S. Ct. at 1717, with reference to creating a demand requirement under the Investment Company Act of 1940. While *Kamen* chose to incorporate state law as the federal common law rule of decision—an approach which, if followed here, manifestly would yield a right of contribution [13]—the Court left no doubt that it was acting pursuant to federal judicial power. See *ibid.*

Petitioners nevertheless argue that the common law power is inapposite because contribution involves a sep-

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[12] Accord *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2764 (1991) (noting that this Court looks "to policy reasons for deciding where the outer limits of the right [of action under § 10(b)] should lie"); *Basic Inc.*, 485 U.S. at 231 (noting the various "common-law requirements" of a Section 10(b) violation); *id.* at 253 ("the case law developed in this Court with respect to § 10(b) and Rule 10b-5 has been based on * * * common law doctrines") (White, J., joined by O'Connor, J., concurring in part and dissenting in part); *Nelson* v. *Bennett*, 662 F. Supp. 1324, 1329 n.8 (E.D. Cal. 1987) ("Having thus 'created' the remedy in the first place, the judiciary has the continuing authority, as a matter of common law, to flesh out the precise contours of the implied private cause of action.").

[13] A decade ago the Court recognized that the states already had overwhelmingly adopted a right of contribution among joint tortfeasors. *Northwest Airlines*, 451 U.S. at 86-87 & n. 17. The same holds true under state blue-sky securities laws. See *McLean* v. *Alexander*, 449 F. Supp. 1251, 1266 n. 48 (D. Del. 1978), rev'd on other grounds, 599 F.2d 1190 (3d Cir. 1979). See Point II(B)(1) *infra*.

arate cause of action that should be analyzed under this Court's curent intent-based jurisprudence governing implied rights of action. See Br. 17-18. This argument is without merit.[14] As described above, the Section 10(b) cause of action is an historical anomaly, created without the benefit of congressional intent. Unless and until that action is eliminated, the same federal common law principles used to create the claim in the first instance must, of necessity, be applied to any essential issue related to the action, including contribution. Just as this Court has federal common law power to recognize a right of contribution for admiralty causes of action (see *Texas Industries*, 451 U.S. at 642), so too it has power to confer a right of contribution for the wholly judicially created action under Section 10(b).[15]

Moreover, the securities laws do not recognize the artificial compartmentalization between substantive causes of action and rights of contribution suggested by petitioners. In Section 11 of the 1933 Act and Sections 9 and 18 of the 1934 Act, the creation of joint and several liability is expressly circumscribed by the right to seek contribution. As such, the very underlying liability among securities codefendants is defined and complemented by the basic equitable principle that a person who shares that liability with another should not bear the sole risk and

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[14] While the claim of contribution happens in this case to have been implemented through a separate later lawsuit, such claims can be—and typically are—raised like any other cross claim in the primary action.

[15] See *In re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. 597, 616 (N.D. Ill. 1987) ("Since federal courts have implied a right of action under Section 10(b), for the court to now focus on legislative intent in deciding the contribution issue would be incongruous with the analysis that created a Section 10(b) right of action.").

burden of payment. See *Alvarado Partners, L.P.* v. *Mehta*, 723 F. Supp. 540, 549 (D. Colo. 1989).[16]

Finally, the Court's refusal to exercise federal common law power to imply a right to contribution in *Texas Industries* and *Northwest Airlines* in no way casts doubt on its power to fashion a federal common law rule of contribution under Section 10(b). As noted above, the Court specifically acknowledged in *Texas Industries* that the federal courts possess the power to create a right to contribution "[i]n areas where federal common law applies." 451 U.S. at 641. And, significantly, in both cases the Court specifically reserved judgment on the appropriateness of implying contribution under the federal securities laws. See *Northwest Airlines*, 451 U.S. at 91 n.24; *Texas Industries*, 451 U.S. at 640 n.11.

More importantly, in refusing to create a contribution rule, the Court in both cases relied primarily on the existence of comprehensive and detailed remedial schemes that expressly conferred private rights of action, while at the same time omitting any correlative right of contribution. See *Northwest Airlines*, 451 U.S. at 93-94, 97; *Texas Industries*, 451 U.S. at 644-645. The omissions strongly suggested that Congress did not intend to confer a right to contribution. Accordingly, it would have been inappropriate for this Court to have overturned that policy choice by recognizing contribution as a matter of federal common law.

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[16] In another context, the Court in dictum has characterized contribution as a new cause of action, rather than a remedy. See *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. 1028, 1034 n.6 (1992). That characterization has no bearing on the proper standard to be applied in implying a right to contribution under a statute where Congress repeatedly circumscribed the underlying liabilities by a corresponding right to contribution.

By contrast, with Section 10(b) "[w]e are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question." *Blue Chip Stamps*, 421 U.S. at 749. Accordingly, *Texas Industries* and *Northwest Airlines* in no way cast doubt on this Court's authority to exercise judicial power in accordance with common law practice and principles well recognized for decades under Section 10(b).

B. Federal Common Law Principles Favor Retention Of The Longstanding Contribution Rule Under Section 10(b)

Two factors favor the exercise of this Court's common law power to recognize a right of contribution under Section 10(b). The first is the clear evidence of congressional intent, as demonstrated by Congress's provision of contribution in every express cause of action of the securities laws that contemplates more than one defendant. See Point I, *supra*. Not only does that evidence satisfy the "clear implication" standard of *Texas Industries*, but it also provides a cogent argument for recognizing contribution as a matter of federal common law, particularly when combined with the policy considerations that have become the operating framework for analysis under the securities laws.

1. *The Twenty-Five Year Acceptance Of Contribution In Section 10(b) Actions Has Established Its Legitimacy As An Element Of The Statutory Scheme*

Like the Section 10(b) cause of action itself, a right to contribution for such actions has long been part of the fabric of securities law litigation. Indeed, the right to contribution under Section 10(b) was first implied in 1968—almost a quarter of a century ago. See *de Haas* v. *Empire Petroleum Co.*, 286 F. Supp. 809 (D. Colo. 1968). "Since *deHaas*, the courts considering the question have almost without exception held that a right to contribution exists in actions under rule 10b-5." Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 Iowa L. Rev. 533, 539 (1981).[17]

This "longstanding acceptance by the courts" of the contribution rule, "coupled with Congress' failure to reject [it]," argue significantly in favor of its recognition by this Court. See *Blue Chip Stamps*, 421 U.S. at 733.[18] Indeed, the implied right of contribution under Section 10(b) now has been recognized by the federal courts for

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[17] The Second, Fourth, Fifth, Seventh and Ninth Circuits have all found a right to contribution under Section 10(b). See *In re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991); *Smith* v. *Mulvaney*, 827 F.2d 558 (9th Cir. 1987); *Huddleston* v. *Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), aff'd in part and rev'd in part on other grounds, 459 U.S. 375 (1983); *Heizer Corp.* v. *Ross*, 601 F.2d 330 (7th Cir. 1979); *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), aff'd per curiam, 442 F.2d 1346 (2d Cir. 1971), cert. denied, 404 U.S. 941 (1971). In addition, dozens of district courts around the country have recognized such a right. Significantly, no court reached a contrary conclusion until 1988—20 years after the right to contribution was first established. See *In re Professional Financial Management, Ltd.*, 683 F. Supp. 1283, 1285-86 (D. Minn. 1988). And since 1988, only two other courts have rejected the contribution rule under Section 10(b). See *Chutich* v. *Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992); *Robin* v. *Doctors Officenters Corp.*, 730 F. Supp. 122 (N.D. Ill. 1989).

[18] See also *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 384-85 (1983) (in adopting particular interpretation of Section 10(b), the Court relied on the "consistent line of judicial decisions" in favor of the interpretation and Congress's failure to reject it); *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 379-82 (1982) (in upholding implied private right of action under the Commodity Exchange Act, the Court relied on the fact that "the federal courts routinely and consistently had recognized" such an action, and that Congress had failed to reject it); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 577 n.19 (1979) (in refusing to imply a cause of action under § 17(a) of the Exchange Act, 15 U.S.C. § 78q(a), the Court stressed the absence of a "history of longstanding lower-court interpretation" in favor of such an action).

the same length of time as was the implied claim itself under Section 10(b) when this Court first endorsed it (see *id.* at 730)—an endorsement which similarly was based in large measure on "[j]udicial interpretation and application, legislative acquiescence, and the passage of time." *Basic Inc.*, 485 U.S. at 230-31. To reverse the rule at this late date would interfere with the coherent and cohesive scheme of federal securities litigation that has operated for the past quarter of a century.

This Court also recently has looked to state law rules in interpreting the federal securities acts. See p. 13, *supra*. Here, too, the result is the same. Only four states do not allow contribution among joint tortfeasors.[19] And perhaps even more directly pertinent, state securities statutes likewise now overwhelmingly endorse contribution. See p. 13 n.13, *supra*.

2. *Prohibiting Contribution Would Unfairly Allocate Liability Under Section 10(b)*

Barring contribution would undercut the purposes of the securities laws and result in substantial unfairness by allowing some wrongdoers to escape responsibility while rendering others liable for amounts wholly disproportionate to the extent of their wrongdoing. As this Court has explained, "a more 'equal distribution of justice' can best be achieved by ameliorating the common-

[19] In addition to the 39 states and the District of Columbia cited in *Northwest Airlines*, 451 U.S. at 87 n.17, the following states allow for contribution among joint tortfeasors: Connecticut (see Conn. Gen. Stat. Ann. § 52-572h (West 1991)); Montana (Mont. Code Ann. § 27-1-703 (1991)); New Hampshire (N.H. Rev. Stat. Ann. § 507:7-f (1991)); Ohio (Ohio Rev. Code Ann. § 2307.31 (1991)); Oklahoma (Okla. Stat. Ann. Tit. 12 § 832 (West 1992)); South Carolina (S.C. Code Ann. § 15-38-20 (Law Co-op 1991)); Washington (Wash. Rev. Code § 4.22.040 (West 1992)). Even Vermont and Wyoming allow contribution under certain circumstances. See Vt. Stat. Ann. tit. 7 § 501 (1991) (civil damages action for unlawful sale of intoxicating liquors); Wyo. Stat. § 34.1-3-116 (1977) (liability on negotiable instruments).

law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974).[20] By providing a right to contribution for every express cause of action comparable to Section 10(b), Congress obviously agreed that contribution represents the more equitable rule.

Prohibiting contribution is particularly unfair in light of the wide variation in culpability among Section 10(b) defendants.[21] Without contribution, secondary actors,

[20] See also *Nelson*, 662 F. Supp. at 1328 (under a rule of no contribution, "plaintiffs could unilaterally force one of many wrongdoers to bear the entire loss, even though others may be equally or more to blame."); Note, *Judicial Implication of Contribution Under Section 10(b) of the Securities Exchange Act: Is the New Branch on the Judicial Oak Threatened by Strict Statutory Construction?* XVI Suffolk L. Rev. 983, 988 (1982) (rule of no-contribution "ignores basic principles of fairness by thrusting the entire loss onto one unfortunate defendant who is only partially at fault"); *Odd Bergs Tankrederi A/S* v. *S/T Gulfspray*, 650 F.2d 652, 654 (5th Cir. 1981) ("Contribution * * * is based on the equitable theory that even though a wrongdoer may be liable for damages to the injured party, it should not have to bear the entire amount of damages when others are partly at fault"); Adamski, 66 Iowa L. Rev. at 541 ("[F]undamental fairness requires that the financial loss caused by joint wrongdoers be apportioned among them. The governing principle of contribution is that no obligor should be unjustly benefited at the expense of another.") (footnote omitted).

[21] See Branson, *Collateral Participant Liability Under the Securities Laws—Charting the Proper Course*, 65 Or. L. Rev. 327, 329-30 (1986) (noting that "[m]any defendants are only secondarily present in a transaction. They will have been engaged in 'customary business activities, such as loaning money, managing a corporation, preparing financial statements, distributing press releases, completing brokerage transactions, or giving legal advice.' In so doing, these 'collateral participants' ' conduct, or failure to act, has touched the transaction that the plaintiff claims has wronged him. Corporate officers and directors, accountants, business or public relations consultants, consulting and other engineers, brokers, and lawyers

such as underwriters, lawyers or accountants, who are only tangentially related to the wrongdoing, could nonetheless be held liable for the entire vast judgment, while the primary wrongdoer is permitted to escape responsibility; moreover the plaintiff could elect, for purely tactical or collusive reasons, to achieve that very result. Only a contribution rule can ensure that "[p]articipants on the fringe of a securities fraud case [do] not bear the same burden as those at its heart." Note, *All Things Being Unequal: Use of the Doctrine of Relative Culpability in Apportioning Contribution*, 57 U. Cinn. L. Rev. 769, 785 (1988).

In the final analysis, apportioning liability without contribution would constitute an irrational means of enforcing the securities laws. Plaintiffs' personal, tactical, and litigation priorities would be the unilateral determinant of liability, rather than any realistic assessment of actual or relative fault. ["R]equiring one of many participants to pay the entire judgment merely because the plaintiff, through oversight, whim, or collusion with other wrongdoers, fails to sue all of the wrongdoers would be an arbitrary and unfair manner in which to redress violations of Section 10(b)." Adamski, 66 Iowa L. Rev. at 541-542 (footnotes omitted).

3. *Abolition Of The Contribution Rule Would Significantly Increase The Power Of Plaintiffs To Coerce Unfair Settlements*

Abolition of the contribution rule under Section 10(b) would also reward meritless strike suits brought against "deep pocket" defendants by plaintiffs in the hope of ob-

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are typical categories of collateral participants.") (footnotes omitted); Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 Pa. L. Rev. 597, 599 (1972) (discussing varying degrees of defendants' knowledge, participation and duty); Adamski, 66 Iowa L. Rev. at 541 ("Numerous parties with varying degrees of participation in the fraudulent scheme may be responsible for a violation of Section 10(b).").

taining a quick settlement. This Court has recognized that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S. at 739. In particular, in light of the massive theoretical damages which can arise when millions of shares of securities change hands, the Court has recognized that

> in the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit.

Id. at 740.[22] Indeed, "Congress itself recognized the po-

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[22] The particularly abusive nature of securities litigation has been repeatedly noted by the lower courts which routinely handle such cases. See, *e.g.*, *Romani* v. *Shearson Lehman Hutton, Inc.*, 929 F.2d 875, 878 (1st Cir. 1991) ("We have been especially rigorous in demanding such factual support in the securities context to minimize the chance 'that a plaintiff with a largely groundless claim will bring a suit and conduct extensive discovery in the hopes of obtaining an increased settlement, rather than in the hopes that the process will reveal relevant evidence.'") (quotation omitted); *Wayne Investment, Inc.* v. *Gulf Oil Corp.*, 739 F.2d 11, 13 (1st Cir. 1984) (noting tendency to file groundless suits to gain *in terrorem* increment of settlement value); *Decker* v. *Massey-Ferguson, Ltd.*, 681 F.2d 111, 116 (2d Cir. 1982) (noting that securities plaintiffs use "conclusory generalizations * * * to set off on a long and expensive discovery process in the hope of * * * obtaining a substantial settlement"); *Ross* v. *A.H. Robins Co.*, 607 F.2d 545, 557 (2d Cir. 1979) (noting tendency to raise baseless claims simply to force settlement), cert. denied, 446 U.S. 946 (1980); *Konstantinakos* v. *FDIC*, 719 F. Supp. 35, 38 (D. Mass. 1989) ("in securities fraud cases . . . the strike suit value of a complaint is high."); *DMI Furniture, Inc.* v. *Brown, Kraft & Co.*, 644 F. Supp. 1517, 1529

tential for nuisance or 'strike' suits in this type of litigation." [23] *Ibid.*

In construing the securities laws, this Court, not surprisingly, has taken into account the undesirability of rewarding strike suits.[24] Here, if contribution were abolished, plaintiffs would be vested with new power to isolate and threaten defendants with the risk of sole liability for damage judgments. The risk of substantial unilateral liability [25] would expand the pressure already felt by securities defendants to settle for amounts that bear no relation to the merits of the lawsuit or any realistic assessment of the extent of a defendant's actual or comparative culpability.[26]

(C.D. Cal. 1986) ("Securities litigation not only is very expensive, it presents significant opportunities for abuse. * * * The tendency in every case is to look to the 'deep pocket.'") (footnotes omitted).

[24] In this regard, a recent comprehensive study of securities class actions argued that "[t]he strength of the plaintiffs' case on the merits thus did not appear to be a significant factor in determining the [settlement] outcomes of these cases." Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 500 (1991).

[24] See *Blue Chip Stamps*, 421 U.S. at 740-41 (threat of strike suits counseled against expanding the class of plaintiffs who may sue under Section 10(b)); *Virginia Bankshares*, 111 S. Ct. at 2760 (director's disbelief or undisclosed motivation alone not sufficient to sustain § 14(a) action because "the temptation to rest an otherwise nonexistent § 14(a) action on psychological enquiry alone would threaten just the sort of strike suits and attrition by discovery that *Blue Chip Stamps* sought to discourage").

[25] As noted, the only express provision of the 1934 Act, of which Section 10(b) is a part, which fails to provide explicitly for contribution is Section 16(b). But there, damages are capped and limited to the profits actually realized by the short-swing trade. Indeed, if there is more than one beneficial owner of a traded security, disgorgement remains determined by "the amount recoverable as if there were only one beneficial owner." 17 C.F.R. § 240.16a-1(a)(3) (1992).

[26] See Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 Harv. L. Rev. 1170, 1172 (1941) (no-contribution rule

4. *The Contribution Rule Has Not Impaired Judicial Management Or Enforcement Of The Securities Laws*

In arguing against the contribution rule under Section 10(b), petitioners stress a number of practical problems that have allegedly resulted from the rule. Specifically, they argue that the contribution rule has increased the complexity and cost of securities actions, reduced settlements and partial settlements of cases, and decreased the deterrent effect of the securities laws. See Br. 37-40. These arguments offer no support for eliminating the right to contribution under Section 10(b); they would apply equally to allowing contribution under *any* provision of the securities laws. In providing contribution throughout the securities statutes, Congress considered and rejected the notion that the costs of the contribution rule outweigh its benefits. That policy choice should be respected by the courts in construing Section 10(b).

Furthermore, nothing in the record or in reality supports petitioners' suggestion that contribution under Section 10(b) has unduly increased the complexity of proceedings under the securities laws. Since 1933, "federal trial courts have been able to successfully apply a contribution rule established under the securities law." Sullivan, *New Perspectives in Antitrust Litigation: Towards a Right of Comparative Contribution*, 1980 U. Ill. L.F. 389, 411. And, in light of the availability of contribution under the other express provisions of the

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allows plaintiff to induce defendant into inflated settlement by threatening to sue him alone); Note, *Contribution in Private Antitrust Actions*, 93 Harv. L. Rev. 1540, 1552 (1980) (barring contribution increases "the ability of plaintiffs to coerce defendants into unfavorable settlements through the threat of tremendous liability"); Note, XVI Suffolk L. Rev. at 988 (although a defendant "may have been only a minor participant in the actions that caused the plaintiff's injury, and might never be adjudged liable, he will feel compelled to settle with the plaintiff to avoid the catastrophic consequences of solitary responsibility").

securities laws, the federal courts have had no choice but to develop and apply a body of contribution law; that would remain true whether or not a right to contribution is implied under Section 10(b).[27] In fact, since securities fraud plaintiffs frequently allege claims under federal and state provisions providing for contribution alongside claims under Section 10(b), partial settlements in any event must take into account and fashion protection against the possibility of nonsettling defendants raising claims for contribution.

Nor is there evidence that contribution has decreased settlements or partial settlements of Section 10(b) actions. Contrary to petitioners' suggestion (Br. 39), cases brought under Section 10(b) have been routinely settled in the Ninth Circuit, as elsewhere, despite the availability of contribution.[28] Indeed, as one commentator noted, "the settlement rate for securities class actions is much higher than for civil litigation generally." Alexander, 43 Stan. L. Rev. at 525. A classic example of a securities fraud case involving numerous defendants that was settled in a systematic manner is *In re Washington Public Power Supply System Securities Litigation*, 720 F. Supp. 1379 (D. Ariz. 1989), aff'd, 955 F.2d 1268 (9th Cir. 1992). Rather than acting as a barrier to settlement, the availability of contribution helped to expand the universe of potentially liable defendants.

Furthermore, litigants and the federal courts readily have adopted litigation devices to encourage early, partial settlements. Plaintiffs and early settling defendants can agree to indemnification or judgment-reduction provisions whereby later asserted claims against a settling defendant are indemnified against or are set off by reducing any subsequent judgment procured against the nonsettling defendants. See *In re Ivan F. Boesky Securities Litigation*, 948 F.2d at 1369. Or settling parties can apply for a settlement bar order, by which contribution claims by nonsettling defendants can be barred and partial settlements treated as conclusive and fair. While the courts have adopted different approaches to settlement bars,[29]

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[27] Federal courts also must craft contribution rules with respect to other federal causes of action. See, *e.g.*, *Cooper Stevedoring Co.*, 417 U.S. 106 (holding contribution is available among joint tortfeasors in admiralty cases). And "courts, while exercising diversity jurisdiction, are experienced in applying contribution rules under state law, and various procedural rules have assisted trial courts in the management of complex cases." Polden & Sullivan, *Contribution and Claim Reduction in Antitrust Litigation: A Legislative Analysis*, 20 Harv. J. on Legis. 397, 413 (1983) (footnote omitted).

[28] See, *e.g.*, *Waller* v. *Financial Corp. of America*, 828 F.2d 579 (9th Cir. 1987); *Roberts* v. *Heim*, 1991 WL 427888 (N.D. Cal. Aug. 28, 1991); *In re United Energy Corporation Solar Power Modules Tax Shelter Investment Securities Litigation*, 1989 WL 73211, *4 (C.D. Cal. March 9, 1989); *Kirkorian* v. *Borelli*, 695 F. Supp. 446 (N.D. Cal. 1988); *Nelson*, 662 F. Supp. at 1338; *In re Nucorp Energy Securities Litigation*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987); *Harmsen* v. *Smith*, 1985 WL 5824 (S.D. Cal. Sept. 30, 1985); *Harrison* v. *Sheats*, 608 F. Supp. 502 (E.D. Cal. 1985); *Bush* v. *Rewald*, 1986 WL 15338 (D. Hawaii Sept. 4, 1986); *Smith* v. *Mulvaney*, 1985 WL 29953, *2 (S.D. Cal. June 5, 1985); see also *In re Ivan F. Boesky Securities Litigation*, 948 F.2d 1358 (2d Cir. 1991); *In re Allstar Inns Securities Litigation*, 1991 WL 352491 (S.D.N.Y. Nov. 20, 1991); *O'Brien* v. *National Property Analysts Partners*, 739 F. Supp. 896, 898 (S.D.N.Y. 1990); *Langford* v. *Fox*, 1988 WL 70351 (S.D.N.Y. Sept. 28, 1988); *First Federal Savings & Loan* v. *Oppenheim, Appel, Dixon & Co.*, 631 F. Supp. 1029 (S.D.N.Y. 1986); *Bottaro* v. *Hatton Associates*, 96 F.R.D. 158, 160 (E.D.N.Y. 1982); *Jezarian* v. *Csapo*, 479 F. Supp. 469 (S.D.N.Y. 1979).

[29] For discussion of the various forms of settlement bars, see *In Re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020 (2d Cir. 1992) (discussing settlement bars under ERISA); *In re Jiffy Lube Securities Litigation*, 927 F.2d at 160-61 & n.3; *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), cert. denied, 111 S. Ct. 232 (1990); *Singer* v. *Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989), cert. denied, 493 U.S. 1024 (1990). Because resolution of the proper settlement bar mechanism in securities cases is not part of the question presented, there is no need for this Court to decide that issue here.

plaintiffs and defendants for decades have lived with these rules in the many jurisdictions and with respect to the many federal and state-law claims that allow for contribution.

Equally meritless is petitioners' argument that the contribution rule has interfered with the enforcement and deterrence goals of the federal securities laws. As most courts and commentators have recognized, by broadening the universe of potential defendants subject to suit and increasing the likelihood that culpable defendants will not, for arbitrary or collusive reasons, escape liability, the contribution rule has enhanced deterrence.[30] Indeed, most economists agree that increasing the persons exposed to the likelihood of punishment is a greater deterrent than the severity of the penalty.[31] And Congress obvi-

[30] See, *e.g.*, *Heizer*, 601 F.2d at 332 ("[b]y apportioning the loss among joint wrongdoers the deterrent effect of the judgment is felt by all culpable parties"); *Nelson*, 662 F. Supp. at 1328 ("contribution ensures that the deterrent effect of the law will be felt by all persons contemplating liability, rather than just those persons most likely to be named as defendants by the plaintiffs"); Sullivan, 1980 U. Ill. L.F. at 412 ("contribution increases deterrence by preventing influential violators from avoiding litigation"); Polinsky & Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 Stan. L. Rev. 447, 456 (1981) (the contribution rule is "less likely to produce overdeterrence or underdeterrence caused by the misallocation of liability than the rule of no contribution"); Adamski, 66 Iowa L. Rev. at 541 (the contribution rule "better serves the deterrent purposes of the securities laws").

[31] See, *e.g.*, Andenaes, *The General Preventive Effects of Punishment*, 114 U. Pa. L. Rev. 949, 964 (1966); R. Cyert & J. March, *A Behavioral Theory of the Firm* 119 (1963); O. Williamson, *The Economics of Discretionary Behavior* 48 (1978); Becker, *Crime and Punishment: An Economic Approach*, in Essays in the Economics of Crime and Punishment 9-11 (1974); Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 Va. L. Rev. 1099 (1977); Ehrlich, *Participation in Illegitimate Activities: An Economic Analysis*, in Essays in the Economics of Crime and Punishment III (1974); Polinsky & Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 Am. Econ. Rev. 880 (1979).

ously made its view clear on this issue by expressly providing contribution for actions analogous to Section 10(b).

Finally, the contribution rule can promote enforcement of the securities laws by aiding in the discovery of Section 10(b) violators. Defendants accused of participating in a common scheme can have the incentive to bring other wrongdoers to light and to demonstrate their culpability.[32] Petitioners have identified no compelling reason to eliminate what has proven to be a fair and productive aspect of the securities law enforcement scheme.

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The "clear implication" of the securities laws favoring contribution for securities fraud defendants, along with the "longstanding acceptance by the courts" of that rule (*Blue Chip Stamps*, 421 U.S. at 733), and the policy considerations that this Court is "free to weigh in deciding this case" (*id.* at 749), strongly favor retention by this Court of a right to contribution under Section 10(b).

[32] See Note, *Bucking the Trend: An Argument in Favor of a Fiduciary's Implied Right to Contribution Under ERISA*, 76 Va. L. Rev. 1377, 1405 (1990) ("allowing for the possibility of a right to contribution may increase the incentive of a single defendant to provide evidence against [another defendant] so as to avoid bearing the full weight of the judgment"); Note, XVI Suffolk L. Rev. at 989 (actions for contribution "benefit both the plaintiff and the legal system by facilitating discovery"); Note, *Toward a Workable Rule of Contribution in the Federal Courts*, 65 Colum. L. Rev. 123, 125 (1965) (under contribution rule, plaintiff may gain advantage from presence of multiple tortfeasors who have incentive to demonstrate fault of co-defendants).

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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